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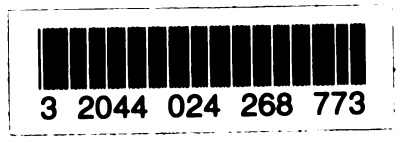


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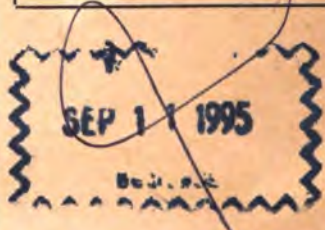

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# PREFACE.

THE following detached pieces, with the incidental allusions, principally owe their origin to the same motive that influenced the Author on a former occasion—a desire to clear up certain points that admitted of illustration, and to bring forward original notices. As every antiquarian knows—amid the fable that obscures Scottish antiquities nearly as greatly as the dearth of record, there is nothing so much wanting in *every* department, as genuine and unexceptionable facts, which often, as our distinguished countryman Lord Hailes has demonstrated, are of far greater importance than the reveries of our writers, and ingenious and speculative inferences. These considerations may, perhaps, plead in favor of the Author, and atone for the motley appearance, in some degree, of his productions,—the union, possibly, of the *serpentes* with

the *avibus*—the *Delphinum in silvis*, &c.—a charge, he is well aware, that otherwise might be formidable.

There are separate causes that have, in part, called forth this publication, of a nature that exclusively apply to him, which obviously speak for themselves.

EDINBURGH, *February* 1835.

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ERRATA.

Page 41, line 22, for *culicularium* read *cubicularium.*
—— 80, — 26, for *delicta* read *debita.*
—— 109, — 19, for *more modern* read *less ancient.*
—— 127, — 5, for *into* read *with.*
—— 150, — 11, for 1316 read 1323.
—— 174, — 8, add *publice* after *presenti.*
—— 178, — 16, no marks of quotation before *sensyne.*
—— 187, — 28, for *Katherinæ* read *Katherina.*
—— 192, — 21, for *effectual* read *effectuat.*
—— ib. — 25, reference (1) to be added after *debere,* to the note.

*Nota.*—At p. 176, line 8, the comma, instead of being prefixed, to be added after *predictorum,* the latter word, from the context, and previous part of the deed, referring to Scotland and Ireland.

# REPLY

TO

# MR. TYTLER'S

## "HISTORICAL REMARKS ON THE DEATH OF RICHARD II."

# REPLY

TO

## MR. TYTLER'S "HISTORICAL REMARKS ON THE DEATH OF RICHARD II."[1]

THERE is a strange leaning in the human mind to miracle and romance, in matters of History. No sooner has a monarch terminated his career in some remarkable way,—whether suddenly, by assassination, or in battle, than full scope is afforded for the doubts and ingenuity of mankind;—the occurrence, at first, is deemed mysterious, it is next questioned, and at length, fairly denied, with minute and marvellous details of the subsequent events of his life. In this manner, James IV. did not fall a victim to the English archers, but escaped the murderous con-

[1] The present subject was first broached by the Author, in the Caledonian Mercury, for the months of July and August in 1829, where, in particular, he introduced his theory as to the *supposed* Richard, with relative observations and authorities. Although he is informed that it has subsequently elicited discussion, Mr. Tytler's later article, under the title of "Historical Remarks on the death of Richard II.," published in the third volume of his History of Scotland in 1829, is the only one that has met his eye. By some fatality or other, the Author had neither read it, or any part of his History, until a few weeks ago.

flict, and was seen crossing a river after the fatal battle of Flodden; and, if faith is to be given to an ancient chronicle, the opinions were various as to his fate; some imagined that he had perished in battle, while others "opinati sunt, eum a proditoribus a medio esse sublatum."[1]

Sebastian of Portugal did not whiten, with his bones, the sands of Africa, but is to exist during successive ages in a state of abeyance—(if we may use the phrase)—to continue until a certain period, when he is again to appear to his admiring subjects, and to resume with reputation, the sceptre of his ancestors. The annals of the world abound in such precedents, and in the favorable reception of impostors personifying royalty, by foreign countries, whether from interested or hostile motives.

Perhaps, the best instance of the foible in question, occurs in the case of Nero. No historical fact seems better fixed than the violent death of that sanguinary monster, which, as a deliverance from the severest calamities, must have been fearfully inquired into, and not fully admitted, until perfectly ascertained. Both James IV. and Sebastian were gallant and meritorious Princes, the idols of the nation, whose memories might be expected to be warmly cherished, and premature deaths deeply deplored; but who would be likely to entertain such sentiments for Nero—would there not rather be a tendency,

[1] Har. Coll. British Museum.

owing to the many woes he had heaped upon every one, to consign his execrated memory to oblivion, and to shudder at the least chance or prospect of his re-appearing upon his former theatre? Yet Suetonius informs us, that, after his death, there was a very general rumor that he was still alive, and many even attempted to promulgate his edicts, with repeated assurances, that he would be shortly in Rome, to resume the reins of government, to the dismay and confusion of his enemies. Nay, the same author adds, that, twenty years before he wrote, when he was a boy, there appeared a mysterious stranger, "qui se Neronem esse jactaret," and who inspired the Parthians so intensely with the belief, that they strenuously assisted his cause, and could hardly be prevailed upon to deliver him to the Romans.[1] The latter part of the intimation is remarkable, for it was thus in a foreign and hostile country, where he appears exclusively to have remained, that this person was chiefly countenanced, which will be kept in view, in reference to another impostor who will appear in the sequel.

The conceit of the escape of Richard II. from Pomfret Castle, and "the bloody tower," said to be the scene of his death—and subsequent existence,—into which we will now inquire—may form another illustration of the same tendency. In whatever way Richard may have perished—for the

[1] Sueton. Nero Claudius, § 57.

secrets of dungeons are seldom or ever published—we have strong and direct evidence, especially in a point of such antiquity, of the fact of his death at Pomfret, early in 1400. Walsingham, a cotemporary, and a favourite authority of Mr. Tytler, informs us, that Richard's body, after his decease at Pomfret, on Saint Valentine's day, (the fourteenth of February,) in that year, was exhibited at all the places of note on the route to London, where, in Saint Paul's Cathedral, in the presence of the King and the Londoners, the funeral service was performed.[1] Otterburn, also a cotemporary, corroborates Walsingham in these particulars, with the addition that that portion of Richard was disclosed by which he could be recognized—the face being bare and open from the forehead to the throat.[2] The testimony of Hardyng, independently of being a cotemporary, like the two former, is very important, because, while noticing the funeral ceremony at the same time, he explicitly says *that he himself saw* " the *corse*" of Richard in " herse rial"—that is, in the royal hearse in which it was placed. We therefore have the direct testimony of an eye witness, which
P. 355. [3] Mr. Tytler, for no proper reason that we can discover, affects to contemn. This at least is certain; that he admits the declaration on the part of Har-

[1] Pages 404—5. [2] P. 229.

[3] The disquisition of Mr. Tytler, (as already observed, in the third volume of his History,) will be thus referred to throughout upon the margin of the page.

dyng. The latter also affirms that the ceremony was repeated in Westminster Abbey. Froissard, as he informs us, had been secretary to Edward III., the grandfather of Richard, by whom he had been hospitably entertained, and munificently remembered on his leaving England.[1] He states that Richard, after his death, " was placed in a litter covered with black, and a canopy of the same. " Four black horses were harnessed to it, and two varlets in mourning conducted the litter, followed by four knights, dressed also in mourning." In this manner, they left the Tower, " and paraded the streets at a foot's pace, untill they came to Cheapside, which is the greatest thoroughfare in the city, and there they halted for upwards of two hours. *More than twenty thousand persons* of both sexes *came to see the King*, who lay in the litter, his head on a black cushion, and *his face uncovered.*" Froissard adds, " some pitied him, when they saw him in this state, but others not, saying, he had, for a long time, deserved death."[2] The following excerpt is from Caxton's chronicle, which was originally printed in 1480. —" And when Kyng Henry wyst and knewe verely that *he (Richard)* was dede, he lete sere hym in the best mannere, and closed *it*[3] in a fayre chest wyth dyverse spyces and bawmes, and closed hym in a lynnyn cloth, *al sauf his vysage, and that was left*

[1] Vol. IV. p. 688.—*Johnes' Edit.* [2] Ibid.

[3] So in the original.

*open*, that al men myght se his persone from all other men. And so he was broght to London with torche lyght brenynge to Saint Paules, and there had his masse and dyryge, with moche reverence and solempnyte of servyce." It is added, that the same ceremony took place at Westminster.[1] Fabian, a citizen and alderman of London, who lived before the middle of the fifteenth century, while he states the more important of these particulars, further intimates, that the corpse had also been shewn "*open visaged* at the minster of Pomfret."[2] All English historians here agree in essentials, so it may be unnecessary to appeal to any more, as it would be mere repetition; it may be only observed, that Speed affirms that the corpse "bare-faced, *stood* three days for all beholders."[3]

The fact of the death of Richard at the above period, would therefore appear to be certain; and it is irrelevant to the present discussion to speculate in what manner it was effected. It would be a jest to suppose that either Henry or the perpetrators would divulge it; and, in these circumstances, the alleged uncertainty and discrepancy in the account, are of no moment, but only further prove, what may be admitted, that he was secretly, and probably, in some undue way, deprived of his existence. After all, however, there is not *much* diversity in the reports of his death; according to some, he was assassinated

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[3] Edit. 1614, p. 325.

by Exton and his satellites;[1]—to others, that he was either starved by his keepers, or that, overcome by his misfortunes, he would take no sustenance, or, when he attempted to do so, found it impracticable, and thus pined away. The true nature of his death will never be known, and, in all likelihood, it was carefully and purposely concealed.

In the face of the previous evidence, so satisfactory and explicit, and which alone may settle the question, Mr. Tytler is evidently driven to straits, and naturally fastens upon any thing that may tend to invalidate it. His theory simply is, that Richard did not die at Pomfret, but, having escaped from thence, fled to Scotland, where he remained until his death, which is stated to have happened in the year 1419; but, while he makes these allegations, he has nothing direct to offer, and his argument may be said to rest chiefly upon mere assumption, with little, if any thing, of a plausible description. P. 11.

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The ceremony of the exhibition at Saint Paul's, adopted by Henry IV., seems to have been the best and most solemn method of convincing the public of the death of Richard, which, at such a crisis, and especially for a reason that will appear in the sequel, was peculiarly required. The display of his person, for the time mentioned, in the spacious Cathedral of Saint Paul's, as well as in the other places, amidst a great confluence of people, was no ordinary test, and, considering the notoriety of his appearance, must have proved conclusive. Mr. Tytler seems to think that a free inspection was not allowed; but this is mere assumption, for there is nothing to shew that there was a restriction in this respect—nay, Froissard, the cotemporary and friend of Richard, actually informs us, that the corpse was seen in London by more than twenty thousand persons; and Hardyng, who also lived at that time, while he affirms the corpse to have been Richard's, further intimates that *he himself saw it* in the funeral car or hearse. It is very true, as Mr. Tytler observes, that the face of the King only was visible—the rest of the person being decently muffled up—but this of itself was a sufficient criterion of identity,[1] and it

[1] His physiognomy was peculiar, he was rather "moon-faced," with a diseased appearance; and his hair, which would be partly seen, was yellow.—Such was the fact, if we believe the authority referred to by Mr. Tytler.—Turner's History of England, vol. ii. p. 339.

could not be expected that the body would be exposed in a state of nudity, or even in a slight undress, which would have been highly irreverent and indecorous. There may also have been a reason for the partial developement, in the wounds inflicted upon the unhappy prince during the perpetration of the murder,—or even in the extenuated and wasted appearance of his frame, from the natural effects of destitution, which it was incumbent to conceal. Mr. Tytler rejects the first notion, because, he says, that Richard's murder by Exton " is given up on all hands;" but even admitting the fact, which the author does not, it would be both illogical and unwarranted to infer that the murder may not have been perpetrated in a different manner, and by other individuals. P. 353.

The learned gentleman, however, ventures upon higher ground, and, with the assistance alone of a French authority, of dubious import,[1] maintains, that the body exhibited was not Richard's, but that of Maudelain, a priest, substituted in his room. He has actually adopted this theory in his History,[2] and gives it less scrupulously there, than in his Remarks, which are thrown into a kind of Appendix, because he holds history to be a " sacred field," exclusive of every thing questionable or romantic. Notwith- P. 386.

[1] The French Metrical History of Richard's Deposition, to be alluded to in the sequel.

[2] Vol. III. p. 94.

standing, however, this amiable diffidence upon his
P. 386, 340. part, he at the same time maintains his belief in his theory, whatever may have been the opinion of other writers. It is indeed singular that he could have entertained so wild a notion as the above, under the facts and circumstances of the case. This Maudelain, as will be afterwards seen, had attempted to personify Richard, but, being captured by Henry's party, was put to death, as Mr. Tytler admits, anterior both to the asserted demise of that monarch, and to the ceremony of the exhibition at Saint Paul's.

Such being the fact, this person being guilty of the highest acts of treason, would necessarily experience the utmost rigours of the law—he would be drawn, hanged, and quartered, and his members—more especially his head—agreeably to usual practice, be conspicuously exhibited on the bridge, or gates of London. In this event, being familiar to every Londoner, while pelted by the populace and the elements, and rapidly decomposing, they would be admirably adapted forsooth to stand proxy for Richard! Nay, it is confidently thought that there would not be one indication previously, by which it would be possible to identify them with their owner. Nor can it be supposed that the Lancastrians, after his capture, would delay the punishment of a caitiff who had usurped the name and attributes of their master, or, by the gift of second-sight, could foresee events, and coolly reserve Maudelain for so splendid

a destiny, which they could not otherwise have contemplated.

The circumstances of his death, which, it must be kept in view, preceded by some weeks the asserted one of Richard, are clearly fatal to the idea of the substitution of his body for the latter. As if aware of this, Mr Tytler merely contents himself with saying, that Maudelain was "*executed*"—which announcement, although it would not remove, what appear insuperable difficulties, yet renders the thing more conceivable, because the remains *might* not have been exposed but embalmed, and hence preserved in better condition. But, unfortunately even for this alternative, there is decisive proof that the usual penalties of the law were actually enforced in the case of Maudelain; for, independently of other authorities, Fabian, an alderman of London, who, as has been observed, lived about the middle of the fifteenth century, expressly informs us that Maudelain's head "WAS *sette* uppon London bridge."[1] P. 346.

[1] Chronicle, p. 165, b. Edit. 1533. Hall states, that "*Magdalene that represented the persone of King Rychard* amongst the rebels," (whom he names first,) and the chief conspirators, had their "*heads* sette *on polles* on London brydge to the feare of others, whiche were disposed to commit like offence;" *Edit.* 1550, f. 13,—and the same thing is mentioned by other historians. The most particular account, perhaps, of the event is given in Caxton's Chronicle, originally printed in 1480. "Sir John Mawdelyn and Sir William ferybe *persones* wer drawen thrughout ye cyte of London to Tyburne, and there they were hanged, and their hedes smyten of and set on london brydge."

Hence every question about the head, and Mr. Tytler's argument, at the same time, are also set at rest. The head is thus restored to its proper habitation, to keep "its Sabbath" with the kindred spirits celebrated by Dryden,[1] instead of wandering abroad, and renewing the crime of forgery and imposture—for which, indeed, it was unfit,—in the costly and warmer receptacle that had been provided for it.

In his History, it will be perceived that Mr. Tytler gives, without qualification, the substitution of Maudelain's body for Richard's,[2] but he affects to say, in his Remarks, "it is of little consequence, whether Maudelain's remains, or *some other* mode of deception was resorted to—all that I contend for *is*, that *the body* thus carried in a litter to Saint Paul's *was not* that of the King." This is, indeed, one mode of arguing, and of the simplest and most authoritative kind—whether the most convincing may be left to others to decide; but pray, then, it may be asked, if the body in question was not Richard's, whose body was it? To this, Mr. Tytler can give no answer, and his confident inference that it may have been that of another, being wholly unsupported, is a mere *petitio principii*. Yet it is curious to observe, in spite of this apparent

P. 352.

Edit. 1515, f. 111, b. It is well known that priests had the title of "Sir," prefixed to their names, being Pope's Knights.

[1] "The Ghosts of traitors from *the bridge* descend,
With bold fanatic spectres to rejoice," &c. &c.

[2] Vol. III. p. 94.

stoicism and indifference, that his love for his previous theory, like a first attachment, still nestles in his heart; for he elsewhere contends in his Remarks, P. 354.
"that circumstances in *my* mind—*create a strong impression*—that *either* the head of Maudelain the priest's, or *some other* specious contrivance, was employed." He thus continues to cling to it, in the midst of his perplexity, not remembering, that, in this state of ambiguity, if what was exposed, was "*either*" the head of Maudelain or that of some *other*, as it could not be both, a fair conclusion may arise, that it was *neither*. Mr. Tytler is here obviously at a loss, and wanders in a labyrinth of darkness, in vain attempting to find an exit. The substitution of a different body, is an essential part of his case, and he must instruct it by all means, else Richard could not, as he alleges, have escaped to Scotland, with which his theory is identified. On the other hand, if he fail to do so, the conclusion,—especially after the evidence stated,—is obvious, there was no substitution or deception, no *pseudo* Richard adjected; and the corpse which was exhibited in Saint Paul's, must be presumed to be the *true* Richard's. The authority he opposes, is undeserving attention, for, besides being French, and partial to Richard, it stands alone, and, it will be observed, does not positively assert that Maudelain's body was substituted, but merely starts the idea as a speculation.[1]

[1] The authority in question, is that of the author of the "French Metrical History of the Deposition of Richard the Se-

P. 350—1. The exhibition at Saint Paul's, which Mr. Tytler thinks inexplicable on fair and *bona fide* grounds, but holds to be part of a deception, he remarks, was to undeceive the Londoners, and discredit the rumor of Richard's escape, which, he therefore argues, must have been true. The last inference is a striking fallacy, of which he often avails himself. It is admitted that Henry wished to undeceive the populace upon the occasion—not, however, owing to such reason, but to remove erroneous rumors to that effect, which, as will be afterwards seen, actually originated in Maudelain's previous imposture.

Mr. Tytler now arrives at a circumstance most alarming to the present argument, most suspicious in its nature, and corroborating his charge of imposture against Henry. It seems that Richard's corpse was buried at Langley, instead of Westminster, from the motive, as he assumes, that the substitution of Maudelain's head and body for Richard's might not be detected—which he thinks must have happened at the latter place during the process of the interment.[1] The bare supposition of this

cond," who thus expresses himself, through the medium of Mr. Webb's translation—" But *I* do not believe *for certain*, that *it*, *(the corpse at Saint Paul's)*, was the late King: but I think it was Maudelain, his chaplain.—*If, however, it were he*, I heartily make my prayer to the merciful and holy God, that he will take his soul to heaven."—See Remarks, p. 352.

[1] History of Scotland, Vol. III. p. 94, and Remarks, p. 351—4—5.

has evidently been refuted;—but even admitting the imposture, if the body could be exhibited in the way stated, not only at Pomfret and other places, but at Saint Paul's, without detection, it surely might as safely have been risked at Westminster, during the brief ceremonial of the burial. This might have been accomplished with but little address, by concealing the corpse as before in some sort of envelope,—and certainly with the greatest facility, if, as Mr. Tytler tells us, there was, on this occasion, the substitution of the body of Maudelain, who was as like Richard as one parallel line to another. According to the learned gentleman, Maudelain not only bore an "*extraordinary* likeness to the King," but P. 345.
even "so *exactly resembled* good King Richard in face and person, in form and in speech, that *every* P. 347.
*one* who saw him, *certified* and declared that he was *the old King*;"—nay, he impresses upon us, that he "resembled him *so completely* in face and person, that it is said the likeness might have deceived *any* P. 344.
*one*." Why, such being the fact, as Mr. Tytler is at pains to shew, the body might have been displayed at Westminster, quite naked, for that matter;—where, it may be asked, could there have been a chance of discovery, in the case of such co-identities? They might have been exhibited in their natural state, for the edification of pious catholics, as memorials of mortality on the festival of All Souls, without a mortal knowing the difference; and how were things to be better managed, when, at a certain in-

terval after their death, as must here have happened, they were to be laid in their grave?

The dilemma to which Mr. Tytler has brought himself is this,—how, even supposing the alleged imposture, could we dis-identify Richard from Maudelain, or Maudelain from Richard, seeing, as he assures us, they were exactly alike—or when one was buried in one place, determine he was not the other, and *vice versâ?* The circumstance renders any attempt at discrimination impossible. If ever there was a *felo de se* argument, it is that which he employs through the agency of Maudelain, a phantom who constantly misleads him, as might naturally be expected from an alliance with an evil spirit, such as he confessedly was.

The burial, then, of Richard II. at Westminster, even according to Mr. Tytler's own shewing, would not have unmasked the imposture,—on the hypothesis of there having been one,—and hence, the non-interment in that place, upon which he lays such great stress, is quite immaterial. But, on the other hand, if there *had been* a deception *capable of detection*, the actual fact of the burial at Langley would make against his argument. It certainly was far more practicable to arrive at the secret in the most natural manner, by a dis-interment at that lonely spot, than at Westminister, which was a place of marked publicity, and under the direct surveillance of Henry and the Government. The preference of Langley to Westminister, in the worst alternative,

is thus favorable to the Prince, who might have been guilty of Richard's murder; but cannot, in consequence of the previous circumstance be convicted of the supposed deception. The ceremony at Saint Paul's, no doubt, was very melancholy, and the object of Henry being attained, of giving a palpable refutation to the doubts occasioned by Maudelain's imposture, and not, as Mr. Tytler strangely fancies, to do honor to Richard; it was as well that the solemnity should be quietly ended, without protracting the scene, which might have excited too great commiseration, and created a bias against Henry. The Lancastrians, besides, would be the last to pay more than the scrimpest duties to a person whom they considered a recreant, by whom they had been tyrannically used, and whose memory and condition in life, for very obvious reasons, they would wish to sink in oblivion. If the body, too, had been buried at Westminister, it might, by that re-action which so often excites the populace, have become the object of adoration to the Londoners, at one time the friends of Richard, and inclined them to the Earl of March—the true heir of the crown—in prejudice of the usurper.[1] P. 353.

[1] If we keep to the ordinary rules of succession, the white rose clearly excluded the red; yet, holding the House of Lancaster to have had the preference, nothing could be more absurd than the claim by Henry VII. to the crown in their right, because he only connected himself with them in the female line, through an illegitimate ancestor; who, besides, was not of the

Former impressions often revive most unexpect-
*Ut supra.* edly, and Suetonius further mentions as to Nero, that, subsequent to his death, many for a long time during the spring and summer, decorated his *sepulchre* at Rome with flowers, and even rendered

full blood to Henry IV., his brother *de facto*. The true character of heir of Lancaster, was undoubtedly in the kings of Portugal, as descended from Philippa, the eldest sister *german* of that monarch. From them, it passed to the House of Farnese, also representatives, in the same way, of Portugal, but excluded from the latter crown, because *aliens*, when the Braganzas, the next *indigenous* heirs, succeeded. The Farneses, however, in perfect accordance with heraldry, assumed the arms of Portugal, as they might also have done of England; and the learned Salazar, in his " Glories of the House of Farnese," (§ ii. p. 453,) actually maintains their right as the heirs of Lancaster to the crown of England. The entail of the crown by Henry IV. upon his own line, *might* be adduced as an argument in their favor, for, at the intercession of his people, he innovated upon the principle of male descent which he had at first adopted, and admitted females to the succession, (See Act of Settlement, 1406; Rymer, Vol. VIII. p. 462.) It is very singular that the young Queen of Spain, as the heir of Farnese, is also the direct heir, both of Portugal and of the House of Lancaster. It was only by female descent, that the Royal, now Imperial House of Braganza, who are the younger co-heirs of Lancaster, came to inherit Portugal. In the male line, they are illegitimate, and in 1405, Alphonso, Bastard of Portugal, their ancestor, came to England with his sister Donna Beatrice, on the occasion of her marriage with Thomas Fitz-alan, Earl of Arundell, Surrey, &c. Among the Proofs to Souza's comprehensive History of the Royal House of Portugal, (Vol. I. p. 391,) there is a curious notarial exemplification in the same year, of the ceremonial of their nuptials in the presence of Henry IV., the Prince of Wales, and a numerous

homage to his bust; although immediately upon its occurrence, the joy of the populace was so excessive, that they were unable to contain themselves. As if aware of such a feeling, the government of George II. would not allow the remains of Lord Lovat, after his execution, to be buried among his clan; and, in the same way, a party in France are against the admittance of the bones of Napoleon. It was, therefore, more politic in Henry to throw the remembrance of Richard, as much as possible, into the shade, and to substitute the quiet seclusion of Langley for the pomp and publicity of Westminster.

Mr. Tytler would fain attempt to shew, as may be already evident, in order to give consistency to his theory of the survival of Richard II., that a *true* rumor of his escape from Pomfret Castle had commenced after his confinement there, and before the period of his asserted demise. It is, indeed, difficult to discover what foundation there can be for this, and he here certainly, as far as can be seen, is eminently unsuccessful. All that he can adduce are circumstances connected with the imposture of Maudelain, who may be truly called his evil genius, for by some fatality he constantly misleads him. P. 346.

Court, illustrating the forms and ritual in the case of marriages. The parties are married by the Primate, (a confidential friend, as will afterwards be seen of Henry,) in his chapel at Lambeth, and the latter acting for John, King of Portugal, her natural father, gives the bride away.

This person, once a clerical attendant upon Richard II., was a mere puppet in the hands of the Lords, who were then in opposition to Henry IV., and who, at Christmas 1399,[1] had formed a conspiracy with the view of restoring Richard. In furtherance of this scheme, they prevailed upon Maudelain, who, as before stated, resembled Richard, to personate the monarch, and paraded him about the country, with the insignia of royalty, to convince the people that he was Richard escaped from prison, and to excite them to rise in his favor. The stratagem had a partial success, and it was this imposture alone that originated the rumor of Richard's escape, and not, as Mr. Tytler supposes, any act or attempt to do so upon the part of Richard. Such being the state of things, Mr. Tytler really resorts to a desperate expedient *to prop up his theory*. He attempts to maintain, in spite of the conceived truth and notoriety of the fact, that Maudelain did not personify Richard, and therefore that the co-temporary rumor of the King's escape did not arise from that incident, but from the actual evasion of the *true* Richard, who, accordingly, did not die at Pomfret, but *must* have escaped and fled to Scotland. It is almost ludicrous to proceed gravely to establish such a truism as Maudelain's personification. On Mr. Tytler's hypothesis, it would be difficult to shew why the Lords employed him, for he admits that

P. 347—8.

P. 346. 344—5—6—9.

[1] Otterburn, p. 225. Walsingham, p. 403.

he was aiding them, and in their retinue; but as the fact has been really questioned, we may adduce the following account of Froissard, who, as already observed, had been in England, and was both an acquaintance and cotemporary of Richard.—"They (the Lords,) held a council, and said, we must go and raise the country. We will dress Magdalen in royal robes, and make him ride with us, proclaiming that king Richard has escaped from prison. All who see him will believe it true, and the report will gain such credit that we shall destroy our enemies. This they executed by collecting their whole party—placing Magdalen in the centre, dressed in royal state." But Henry had learned their intention, and that they "had with them Magdalen, one of the priests of the Chapel Royal, to Richard of Bourdeax, dressed up as the late king, and that *they gave it out every where, King Richard had escaped from prison. Many of the country people believed it, saying, we have seen him, mistaking him for the King.*" Froissard concludes the subject by mentioning that "they continued marching through different parts, *publishing every where that Magdalen* was King Richard."[1] One or two English authorities may be also appealed to, and first, Hall, who lived early in the sixteenth century. He says, that the Lords "adorned Magdalene, a man resembling much Kyng Richard, in royal and princely vesture,

P. 346—7—8.

[1] Vol. IV. p. 682–3.

calling him King Richarde, affirming, that by favor of hys kepers he was delivered oute of pryson, and set at libertie, and they followed in a quadrat array to the entent to destroy King Henry."[1] Grafton, who wrote only a year or two afterwards, is to the same effect;[2] and Stow is full upon the subject. He states, that the Lords " bruited that King Richard was escaped furth of pryson, and that he was there with them, and to make their wordes to have the more credite, they had got a chaplain of King Richard called Maudelen—they put him in armour, with a crowne on his helmet, so as all men might take him for King Richard."[3] Additional English authorities might be quoted, but they would be superfluous. Stow intimates that Maudelain thus acted " the more strongly *to seduce the multitude* by so bold and perilous a fiction."[4]—It is little likely that these writers could be mistaken in a matter entirely English, and hence, more especially interesting them. Polydore Virgil, who dedicates his history to Henry VIII., narrates the same thing, and that the Lords converted Maudelain into Richard, " ut Henricum velut hostem patriæ perdant."[5]

It may be especially observed, that the " French Metrical History of the Deposition of Richard II.," upon which Mr. Tytler lays great stress, gives him the flattest contradiction imaginable, for

[1] Edit. 1550, f. 13. [2] Edit. 1569, f. 411.
[3] Edit. 1615, f. 325. [4] Edit. 1614, p. 614. [5] P. 431.

it asserts that the conspirators said, " that good King Richard had left his prison and *was there with them;* and, *to make this the more probable,* they had brought a chaplain who so exactly resembled good King Richard, &c. and declared that he was the *old King.* He was called Maudelain. They armed the aforesaid as King, and set a very rich crown upon his helm, *that it might be believed of a truth that the King was out of prison.*" Here, indeed, is the clearest evidence against Mr. Tytler. It is very evident, if Richard was *there* with them, or in their neighbourhood, as he contends, there was no need of Maudelain's services, which could only be resorted to from the falsity of Richard's escape, and for the purpose of imposture, here obviously employed. Aware of this stumbling-block in his way, the learned gentleman makes another desperate effort, and even seeks to discredit his own authority, by inferring that, as the writer *was a Frenchman,* he may only have spoken from common hearsay, while he further attempts to impugn it, because neither Walsingham or Otterburn, who were Englishmen, and whose evidence, he says, ought to outweigh the former, happen to mention the circumstance. This is a mode of argument he frequently adopts, but it can never follow in the face of decisive evidence to the contrary, that, on account of the mere silence of two writers, who yet state nothing, as in the present instance, to induce us to disbelieve a material fact, we are, therefore, to reject it.

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P. 345, 344.

P. 347—8.

Their taciturnity, however, on this occasion, is easily accounted for. Otterburn was a rigid Franciscan, and Walsingham a strict Cenobiite, and hence, they would be the last, especially from the *esprit de corps* that prevailed among the English clergy, to commemorate such indecent feats and levities, to say the least of them, as had been practised by Maudelain, which were, indeed, highly disreputable, and inconsistent with the gravity of their order. They, therefore, passed them over in indignant silence. However unconsciously, yet it seems pretty clear that Mr. Tytler, to use a common expression, blows hot and cold at the same time. He elsewhere, as has been shewn, to authenticate the conceit of the substitution of Maudelain's body for Richard's, *ex-*
P. 351-2. *clusively* appeals *to the same repudiated French history*, while he, moreover, adduces Berry, another
P. 348. *French* writer—without noticing at all the opposing *English* authorities—to disprove Maudelain's personification, because, although he says,[1] that it had been resolved that " Maudelain was to ride with them (the Lords,) to *represent King Richard*,"—" this plan," using Mr. Tytler's words, " was not afterwards carried into execution."

In this way a French authority is to be rejected, because not backed by an English, while, Proteus-like, it is to be omnipotent, although in the same predicament,—yet, in the last instance, it has been

[1] In his " Relation de la Prise de Richard Second."

proved that the English authorities are not merely passive or silent, but directly contradictory. With respect to the supposed contradiction by Berry, of the personification in question, it does not seem altogether plain from what is stated, but, after due examination, it actually turns out that there is here no contradiction at all;[1] and that the intimation that "the plan *was not afterwards carried into execution*," does not originate in him, but exclusively in Mr. Tytler.[2] Berry, after asserting that Maudelain was to personify the King, *adds no more upon the subject*, which conceived silence upon his part, quite a neutral circumstance at most, is all that Mr. Tytler can found upon. The latter, however, may not have this in his favor, for he only appeals to *partial* selections from Berry by Mr. Webb in the Archæologia, and we have P. 348. not access to the original, which is in France; if the *whole* were before us, we might have the

[1] See Archæologia, Vol. XX. Pp. 217—18.

[2] We may quote here the relative passage in his own words. "There is, however, another manuscript in the library of the King of France, entitled, 'Relation de la prise de Richard seconde, par Berry Roy d'Armes,' which, in some measure enables us to reconcile *this discrepancy (arising from the previous French authority in the way stated.)* According to the account which it contains, it was resolved at the meeting of the conspirators, which was held in the house of the Abbot of Westminster, that 'Maudelain was to ride with them to represent King Richard;' but this plan was not afterwards carried into execution."—Remarks, p. 348.

*finale* of the business in a way that might surprise him. While, therefore, Berry's evidence—that it had been "*resolved*" that Maudelain was "to represent King Richard," at least stands uncontradicted, the inference,—so far from assisting Mr. Tytler, is entirely upon the other side. The principle, that silence is refutation, a favorite one of the learned gentleman (which he evidently here adopts), and not as sometimes thought, homologatory or consentient, will be further alluded to in the sequel. In the meantime, it is very plain that his foreign auxiliaries, seemingly in revenge for his coquetry towards them, as well as the English ones, are inimical to him. One thing more may be observed here, according to Berry, when Henry was preparing to oppose the conspirators, he said, that if he should meet Richard, one of them should die. This is the only straw of which Mr. Tytler can avail himself in support of the conceived escape of the latter; but it is evident, even admitting this solitary French testimony, that the Prince, like others, may naturally have been misled by Maudelain's deception, which was truly the *origo mali*, and it will be immediately seen that the impression, supposing it to be true, must have been entirely momentary.

The Lords confederated against Henry, after they had commenced hostilities, went to the residence of Isabella, Richard's Queen, and informed her that the Prince, having escaped from prison, was at Pom-

fret[1] at the head of one hundred thousand men, and that they were going to join him. This palpable fable was to secure her countenance and support. Mr. Tytler, while he admits the evident falsity in part of the story, again strangely infers that the Lords actually alluded to the escape of the *true* Richard, of which ideal event we are thus, according to him, supplied with the first intimation,—and, therefore, that it had occurred at the time. The supposition, perfectly in keeping with his former conclusions, it need hardly be observed, is quite visionary. The conspirators had nothing to back their assertions, except their own invention, and Maudelain, who here could not be adduced, because the Queen would have detected him; and, accordingly, he is kept out of view, while a flimsy phantom is made to personify Richard. But, independently of this, Walsingham, the very authority to whom Mr. Tytler appeals, after stating that the Queen rejoiced at the news, significantly adds, "*licet inaniter*," shewing that it was all fabrication, and pointedly applies "*mendaces*" to the rumors *thus* circulated, which, he says, even the people of Cirecester, (where the conspirators went, instead of going to meet the King[2]) would not believe. During the whole time, it is indisputable, that Maudelain was with them,

P. 345—6.

P. 404.

[1] Otterburn, instead of Pomfret, substitutes here *Radcote Bridge*, p. 226.

[2]—"putantes *prout erat* rumores eorum *mendaces*. Previously, Walsingham intimates that the conspirators, on leaving the Queen, went first to Abingdon instigating the people, "per omnes

and personifying Richard, which could not have happened on Mr. Tytler's supposition.[1]

The plan of the Lords was, at first to surprise the King; in this they failed, and Henry, to frustrate the object of their plot, while, doubtful of its consequences, proceeded straightway to London, and thereafter having found Richard, upbraided him for his supposed concern in it.[2] Richard therefore had not escaped, and other evidence shews that he was in confinement, both before, and after the defeat of the Lords, and death of Maudelain—thus decidedly refuting the contrary notion which Mr. Tytler is the first to hazard, in the face of authority.[3] As al-

vias ut arma caperent et *occurrerent Regi suo Ricardo*," and then to Abingdon and to *Cirecester*, p. 404.

[1] This, it is conceived, may be already inferred, but independently, there is this additional intimation by Froissard, which is quite decisive, besides confirming what is premised. "*They*, (the Lords,) continued marching through different parts, *publishing every where that Magdalen was King Richard*, and came to a strong town called *Soucester*"—*Cirecester*, as Mr. Johnes makes it. See his Froissard, Vol. IV. p. 684.

[2] Appodigma Neustriæ, P. 556. ap. Campden. Froissard, ib. p. 682—3.

[3] See Walsingham, p. 404—5, and Otterburn, p. 223—8—9, besides the other historians. These writers are much relied upon, and often quoted by Mr. Tytler. Even his redoubted auxiliary, "the French Metrical History," is against him, and it further says—that after Richard had been apprized of the catastrophe of the Lords, he was "so vexed by this evil news, that he neither eat, nor drank from that hour, and thus, as they say, it came to pass that he died;" Archæologia, Vol. XX. p. 219. This is in accordance with the statement of his death, by starvation at Pomfret.

ready observed, too, Henry must thus have quickly undeceived himself, as to any idea of its reality, supposing he had ever fostered such a conceit in his mind.

It is well known that the attempt of the conspirators was crushed, by the skill and enterprize of Henry, and as there is little further to interest us in the matter, we hence arrive at two important conclusions—first, that at this period Maudelain had personified Richard with tolerable success—which alone sanctioned the rumor of his escape; and secondly, that Richard, so far from having escaped, was all along in safe custody—thus cutting up by the root the vital part of Mr. Tytler's theory.

The exposure of Richard's body at the funeral solemnity, was, with the natural view of removing the mistake of those who had conceived Maudelain to be Richard—as well as to satisfy the nation in general, which was especially necessary under the circumstances of the case, and in such fierce and unsettled times. All we can gather respecting Maudelain, is of no benefit whatever to the above gentleman, who likewise confuses his imposture with another, to be afterwards noticed—while it decisively aids the present argument, besides shewing the tendency to this mode of deception.

It is not to be wondered at that Henry felt alarmed in consequence of this conspiracy, which, although crushed, still shewed that Richard, notwithstanding his deposition, retained a certain degree of popu-

larity in the nation, and had adherents willing to rescue him. The crisis demanded speedy and energetic measures, than which none could be more effectual, however atrocious, than the violent death of the Prince. Such a crime was not unfrequent in that age, and it was not one at which Henry or his cotemporaries might be disposed to scruple. Accordingly, it appears by all the authorities, that the death of this unhappy personage followed not long afterwards. Things had come to that pass, that the exigencies of Henry imperiously demanded it, and its generally reported occurrence at this very time, in part proves its reality. Connected with this subject, Froissard mentions rather a curious anecdote. When Henry's council suggested to him that the death of Richard would be more to " his advantage than his life"—thus obviously recommending it,—he made no answer, but, calling for his falcons, affected to be wholly engrossed with them.[1] His conduct here, (what might have been expected from so politic a Prince,) must have made an impression upon his council, and, however contrary to Mr. Tytler's idea, if ever silence gave consent it was probably upon this occasion. Sovereigns, with but little address, can signify their pleasure to others, without directly implicating themselves, as is evident from the precedents of Henry II. in the case of Becket, or more properly Elizabeth, in that of Mary, but still the

[1] Vol. VIII. p. 687.

truth penetrates through the specious, though flimsy veil, attempted to be abjected.

The next thing that calls for our attention is the absence of any rumor or surmise of the existence of Richard II. immediately after his reported death.—The general belief, assuredly was, that he had died; —and farther still, the events that followed fully justify the conclusion.

The King of France, whose daughter the unfortunate Richard had married, and who was well affected to the Prince, at the commencement of the disturbances that sealed his unhappy fate, had resolved to espouse his cause, and accordingly had prepared a large fleet and army in order to succor him. But all of a sudden we find the monarch pause in his operations, and disband the armament; while this singular change in his movements happens to be immediately after the period of the asserted death of Richard.[1] Indeed, it is directly affirmed, upon good authority, that the news of the event dispirited the French, and deterred them from their design.[2] An unavoidable inference therefore arises, that the King of France was fully convinced of the truth of the circumstance, which superseded the ne-

[1] Carte, Vol. II. p. 639. Froissard, Vol. IV. p. 687.

[2] Polydore Virgil, p. 431. This writer, who dedicates his History to Henry VIII., says, that when the news of Richard's death " in Gallios pervenit *Francorum cogitationes fregit*, qui jam ingentem classem paraverant ut primo quoque tempore Ricardo adhuc vivo, opem ferendi causa, in Angliam transmitterent."

cessity of the enterprise,—and this, with the greater reason, as Richard had no issue by his daughter, who was then young, and his death indisputably dissolved the connexion that had subsisted between them. If there had been plausible ground for Richard's survival, not only the affection he bore to the Prince, but the policy which has guided France in respect to England, would have suggested a different course, and induced him to fan the embers of opposition to the Usurper which it would have engendered,—alike favorable to his own interests, and to those of his son-in-law. If we anticipate a little, we will find another action of the same monarch that carries with it equal conviction. He had no hesitation in allowing his daughter Isabel, the widow of Richard, to contract a second marriage, in 1406, with the Duke of Orleans.[1] Now, before he authorized so important a step, he must have been fully satisfied as to Richard's death, which, from his high station and influence,—not to add established alliance with Scotland,[2] (sup-

[1] Anselme, Vol. I. Pp. 114, 206. This author, in his elaborate History of the Royal House of France, states, that the second marriage of Isabel "veuve de Richard II. du nom roy d'Angleterre" with Orleans, was celebrated at Compeigne, on the 27th of June 1406.

[2] It need hardly be observed, that there was at that time a constant intercourse between France and Scotland. In an entry about the supposed Richard in an Exchequer roll for the year 1408, there is reference to the expenses of French Ambassadors on different occasions in Scotland. See Remarks, p. 338.

posing Richard had gone there) he had the best means of ascertaining; nor can it be imagined that, if there had been a presumption to the contrary, he would have sanctioned a union so hazardous to the parties, and that might have led to deplorable consequences. The interests of France and his family were here again identified; for, supposing Richard to have re-appeared, so outrageous an insult would have keenly exasperated him, and converted a former ally into an implacable enemy.

The fact of Isabel's second marriage, is further important, in reference to a confident assertion of Mr. Tytler, that the French, in 1404 and 1405; the years, it will be observed, immediately before it, had discovered their former error, in supposing Richard P. 364—5. dead, and now, forsooth, *generally believed* in "his escape and safety!" This conclusion he draws from two authorities—a French ballad in 1405, by the author of the *repudiated* French "Metrical History," (with whom he still coquets,) which ignorantly favors the idea; and a notice in Walsingham, of a piratical attempt, in 1404, by a French fleet, upon the Isle of Wight, who attempted to fleece the inhabitants out of a tribute in the name of Richard II. and Queen Isabel. All stratagems are fair in war, and the French, doubtless aware of the credulity of the English, and their occasional facility, may have resorted to this *expedient* without any belief in it themselves, merely to meet the exigencies of the

moment. But it is needless to expatiate upon the subject, because the actual marriage of the same Isabel in 1406, to the Duke of Orleans, with her father's unequivocal consent, affords convincing proof that the French, both before, and at that time, at least the best informed of them, must have believed in Richard's death; and even, supposing what is most unlikely, that they had been of a different opinion, in 1404, they must have seen their error and recanted in 1406.

After what has thus been shewn, the author really finds difficulty in assenting to Mr. Tytler's remark in his History, that "it was constantly asserted in France, and *believed* by *many* of those *best able* to *obtain accurate information*, that King Richard was alive, and kept in Scotland."[1]

An argument, by the way, arises against the truth of Richard's escape and subsequent existence in Scotland, as is alleged, from its extreme improbability. Why, if he had succeeded in escaping from Pomfret, fly to so remote a quarter, when he had still friends and adherents in England, and that country had not generally declared against him;—at once separate himself from them and his resources, and leave so advantageous a field open to his rival? Would it not have been better to have thrown himself into the fastnesses of Wales, or the more remote coun-

[1] Vol. III. p. 95—6.

ties, if not into some nearer districts, nay even into Bourdeaux, his birth-place.[1] where his cause was still popular, and a demonstration had been made in his favor? This is the line of conduct which Don Carlos (who is in a similar situation) has at this moment adopted in Spain. On the other hand, if we are to admit Mr. Tytler's theory, Richard not only quits his hereditary dominions, but flies over the marches and lowlands of Scotland, transcends the alpine regions, and at length, for no reason one can discover, miraculously starts up in the out isles of Scotland,[2] where his cause would be as essentially promoted as in the deserts of Arabia. We here find him acting just as an impostor would have done, avoiding places where he might be known, and confining himself to remote and hostile regions, where, being a stranger, he might allege whatever he chose with but little fear of contradiction. The case of the *pseudo* Nero thus again presents itself, who, in like manner, selected the distant and isolated plains of Parthia for his deception. In spite of every occurrence, the supposed Richard remains as fixed to Scotland as Theseus to his chair,—of a truth in that country, *sedet æternumque sedebit*, without a chance of Mr. Tytler or the *Richardites* being able to draw him from thence, or to connect him with his ideal royalty.

[1] As is well known, he is styled by French writers Richard of Bourdeaux.

[2] This will be afterwards seen.

For more than two years after the death of Richard II., which is stated to have been on the 14th February, 1400,[1] there follows a decided calm or *interregnum* in events, that interest us, which is extremely material, for it was the period of all others when the truth was most likely to be known. At that critical time, no one dreamt that Richard was alive, and nothing is known of him in any quarter, for too plain a reason, because he was in his grave. We now come to later occurrences connected with the theory the author has formed, and which may shew the origin of certain rumors that subsequently prevailed.

One of the most atrocious actions in the reign of Richard II., was the murder of his uncle, the Duke of Gloucester, chiefly perpetrated by William Serle, a servant and yeoman of the robes to the King—one of those creatures, in whose society the monarch, who was fond of low company, occasionally demeaned himself. Serle, along with Fraunceys, yeoman of the chamber to the Earl of Rutland, suffocated the Prince, by throwing a feather-bed upon him, which they pressed with the full weight of their bodies until he was bereaved of existence.[2] The aiders and abettors in the enterprize were Wil-

[1] On Saint Valentine's day, in that year, see Walsingham, p. 405, and Otterburn, p. 228–9.

[2] Otterburn, p. 193.—Rolls of Parliament, Vol. III. p. 452–3. Placita coram Rege in Parliamento, 1 Henry 4.

liam Rogers and William Denny, yeomen of the Duke of Norfolk, a certain yeoman of the Earl of Rutland, called "Cock of the Chamber," &c., persons in that situation of life that rendered them fit tools in every wicked project that had been devised by their unprincipled masters, and much of the same stamp with Maudelain, although he was an attendant in a clerical capacity upon Richard. The bonds between the Prince and Serle were of the most intimate kind, and the latter, together with Maudelain, even figures as one of the executors to his will.[1] He was a man of the most depraved character, and, according to Walsingham, a cotemporary, an object of execration to the whole kingdom.[2] With Richard's secrets, habits, and manners, no one could be better acquainted—a circumstance, as will be afterwards seen, of which he did not fail to avail himself. He had at one time or other contrived to steal Richard's signet, so that, with the addition of a little forgery and address, he was well able to impose upon people by means of supposititious letters from the Prince.[3] When Richard's catastrophe happened, a total reverse, of course, followed in his fortunes—his previous dependence upon Richard, so far from benefitting him, made him unpopular, and an object of distrust; and finally, the apprehension of Hall, a

[1] Rymer, Vol. VIII. p. 77. Richard's will is dated in 1399.

[2] "Invisum toto regno," p. 414.

[3] This will be immediately instructed.

party in Gloucester's murder, but not so guilty as himself, with his full confession of all the particulars,[1] rendered a stay in England no longer safe, and he, therefore, wisely lost no time in escaping to France.

In this manner, a wretched outcast, without certain means of livelihood, it is not to be supposed that a man so unprincipled, and capable of any act, would allow his peculiar talents to remain unexercised. Not only his own interest, but a natural thirst of revenge, would tempt him to devise projects that might disturb the present order of things, and, accordingly, we find him identified—and this, it is conceived, is a circumstance of great importance, *with the very first notice* that is preserved of the Scottish Richard. It is proved by two English documents, in June 1402,[2] that there was then in Scotland a person bearing a kind of resemblance to Richard,[3] *and that Serle was with him*, who, it is further stated, was making due preparations for his hostile ingress into England.[4] At the same time, it is instructed by other authorities, that Serle had dispatched letters to persons in that country in-

[1] Rolls of Parliament, Placita coram Rege, &c. *ut supra*.

[2] Rymer, Vol. VIII. P. 261—2.

[3] The words are "*quasi* similem nuper Regi Ricardo."

[4] Ibid. Nothing can be better fixed than the first commencement of the rumor. Walsingham says, that it was about Pentecost in 1402, now Pentecost is on the 10th of June, the very month in which the deeds alluded to in the text are dated. See his History, p. 406, and Otterburn, p. 233, both of whom exactly concur in this fact.

timating that Richard II. was alive, and about to proceed to England for the recovery of his crown.[1] Of the means he possessed to do so, there can be no doubt, owing to the circumstances stated of his theft of Richard's signet, which Walsingham expressly informs us he used; and we thus discover the origin of the next imposture, attempted through the medium of an entirely new party, to personify Richard. Wholly at variance with what is affirmed by Mr. Tytler, it is maintained, that from the time of the death of Maudelain, which, it is to be observed, was at the beginning of 1400, down to the month of June 1402, there is no rumor or notice of the existence of Richard, or of any attempt at imposture, excepting what originated from the former. P. 344—5.

[1] "Serle, yoman of the robys to King Richard, sparkled rumors as he came owte of Scotland that King Richard was yet alyve." Leland, Vol. II. p. 485. This notice, which he gives us from an old chronicle, is further curious, as it shews that Serle had thus intrigued between both countries at the time. "Auxit *errorem istum* (*the story of Richard's survival*) cujusdem *Serlonis* quondam culicularium regis Ricardi commentum, qui falso finxerat privatum sigillum nomine dicti regis Ricardi, et destinaverat literas consolatorias simul et consonatorias multis in regno de dicti Ricardi quondam familiaribus, in quibus et continebatur ejus incolumitas, et ipsius in brevi cernendi prospectus." Walsingham, p. 413. He here makes Serle forge the seal instead of having stolen it as by the next authority. "*Hic* (Serle eventually in 1404) confessus est quod in Wallia *furatus* est signetum Richardi, et inde postea multas signavit literas ad amicos regis Ricardi dicentes eum vivere." Old authority ap. Leland, Vol. II. p. 314.

Mr. Tytler has produced no evidence to the contrary, and therefore we are fully justified in disregarding his assertion.

From what has been detailed, there is much reason to believe that Serle, restless and discontented in his exile, was the exclusive author of the new design, so well adapted to his means and resources, and the most likely method by which he could restore his fallen fortunes. He therefore, it is conceived, proceeded from France to Scotland, in company with the puppet who has been mentioned, and by means of their joint agency, although principally by Serle's, the rumor that Richard was still alive, and had fled to the latter country, came first to be circulated. Serle indeed, a year or two afterwards, when captured by the English, confessed that this individual (who he admits was an impostor, and only employed by him to dupe both nations), had been previously in Scotland, and that it was the discovery of him there, that made him embark in the scheme,[1] but he would obviously then conceal his own guilt as much as possible, and attempt, by every means, to fasten it upon another. The former had a kind of resemblance to Richard, as is admitted both by Serle and the English authorities, and hence Serle had fallen upon one who, to a certain degree, was not unfitted for his purpose.

The Scottish nation would be the last either to

[1] Walsingham, p. 414.

check or deaden an attempt that might, in an emergency, be useful to them, and therefore it is not to be wondered at that letters from Serle, who had the best means of judging in such a case, with others forged by him in the name of Richard, containing the very impression of his seal, had considerable success in England, and induced those to whom they were addressed, to believe in his survival. The juncture, too, was not unfavourable, the beginning of a usurpation, like Henry the Fourth's, is liable to plots and intrigues of all kinds,—there were persons dissatisfied with the rewards by which their services were requited, and the natural fickleness of the English inclined them to innovation. Yet it is remarkable that the intelligence did not produce the great excitement that might have been expected; although generally discussed, it chiefly found favor among the vulgar, and the friends and partizans of Richard II., as might equally have happened in the case of any favorable rumor. Mr. Tytler lays much stress upon the Countess of Oxford having given it her countenance,—but was she not, it may be asked, the most likely person in the world to do so—the mother of the minion Oxford, a relative of Richard, whom that monarch had, in a manner, raised to the rank of a prince, under the titles of Duke of Ireland, Marquis of Dublin, &c.—whom he had loaded with rewards and benefits of all kinds, and for whose sake he had sacrificed his own popularity, and sunk himself in

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the esteem of the nation?—She is a partial testimony in the strictest sense, and would evidently have grasped at any straw that might have favored the delusion. Mr. Tytler " contends, that as she was a lady far advanced in life," she was " little
P. 361. likely to engage, upon slight information, in any plot." But this, it is conceived, in the face of the above considerations, and her high rank and influence, would be but a frail obstacle to her aiding and abetting a cause so deeply identified with the interests of her family. Besides, her very age would render her the more credulous, and the more apt to circulate what may be accounted " *aniles fabulæ*" in every view. Then there was Sir Roger Clarendon, who was executed for his concern in propagating the rumor, but he was the natural brother of Richard II.; and, if we add the names of certain ecclesiastics, and some other persons, we have enumerated all those worth noticing who were engaged in the affair. It gave rise to no regular conspiracy, or declared insurrection—the whole consisted in persons, more especially the vulgar, believing in a specious rumor, fabricated by a crafty individual, for which several capitally suffered, and of which Henry, in all likelihood, may have availed himself as a pretext for other purposes.

The year 1402 seems to have been the time when the rumor of Richard's survival, countenanced by the Scots, made the greatest sensation; in 1403 we hear but little of it; and, in 1404, the political at-

mosphere improving, Henry IV. was induced to grant a general pardon to all state offenders, but from this act of clemency he specially excepts "William *Serle*," and "THOMAS WARDE *de Trumpington que se pretende et feigne d'estre Roy Richard.*"[1] The pardon, under the same exception, obtained the sanction of Parliament,[2] and, in consequence, the parties in question were notoriously attainted and outlawed.

The person last mentioned was no other than the Scottish, or pseudo-Richard, an Englishman by birth, and, as will be afterwards seen, the owner of a pendicle of land, with whose name, and identical connection with the act of imposture, we are in this manner presented. His being conjoined with Serle upon the occasion, while equally excepted from the pardon, evidently shews that they were implicated in the same crime, and this, with Warde being expressly said to have personified Richard, clearly identify him with the previous phantom of royalty in 1402, who, as has been proved, had then attempted the same thing, and was instigated and assisted by the former. The conclusion the more inevitably follows, from its appearing by no authority, and never having been maintained, that after

[1] Rymer, Vol. VIII. p. 353.

[2] Rolls of Parliament, Vol. III. p. 544. They are here declared to be excepted from the pardon, and to have no benefit from it. In the Patent Rolls the words, in reference to Warde, are "*qui se nominabat esse Regem Ricardum.*" Calend. Rol. Pat. p. 248.

Maudelain's imposture there was more than one supposed Richard.

It has been seen that Maudelain was an attendant upon Richard II., like those who aided and abetted his atrocities;[1] and it is conceived that this Warde was also some secondary creature about the Prince, who, being familiar with his manners and habits, independently of a supposed resemblance, was not ill adapted to mimic and personify him. In this event, there can be no doubt that he would readily attract the attention of Serle, who was yeoman of the robes; and, in fact, there are circumstances that would lead us to infer, that Warde may have been a domestic in the royal establishment. There were, undoubtedly, during the fourteenth century, persons of the name of "Wyarde" and "Warde," (conceived to be the same) who held subordinate situations in it. Thus John Wyarde figures as Edward the Third's "valet" in the first and second years of his reign;[2] he is also proved to have had a son of the name of Robert;[3] and Richard the Second actually appoints John "Warde," whose surname is thus spelt in the same manner as Thomas

[1] He is directly charged, in the French Metrical History, with being one of those who advised Richard to murder his uncle the Duke of Gloucester. Archæologia, Vol. XX. p. 135. He is said by the annotator there to have been "the most obsequious and daring of Richard's creatures." Ibid.

[2] Rot. Pat. f. 101—103, b.

[3] Ibid. f. 164.

of Trumpington's, his pavilion maker, with certain fees and emoluments.[1] This appears to be a singular coincidence, but the conclusion may be further corroborated by an authority to be shortly adduced,[2] where the impostor, or Scottish Richard, is termed "*famulus natus*,"—that is, one born a servant or domestic. We, therefore, have at least detected his identical name and condition in society.

The wary Scots, however they abetted the design, yet conscious of the imposture, were too prudent to adopt active measures. Notwithstanding Serle's skill and address, and the presumption in his favor, from letters bearing Richard's seal, it was impossible to induce either them or the English to take the field in the cause of the former. This shews the little excitement, comparatively speaking, the imposture occasioned, and the distrust, upon the whole, with which it was received. The Scots merely allowed Serle and his friend to vegetate at their court, until the first, not being rewarded as he expected, or obtaining those large supplies which were probably all he looked for, began to bewail the irksomeness of his situation. He drew a sad contrast between his residence "*in aula Regis Scotie*, and that *in aula Regis Francie*,"[3] where it seems he had been, much to the discredit of the

[1] Rot. Pat. f. 101—197, b.

[2] Letter of the Archbishop of Canterbury to Henry IV.

[3] Walsingham, p. 414.

former, until completely tiring of his position, he went to the borders to interest Sir William Clifford, the governor of Berwick, in his behalf, who then held the fortress against Henry. Some say that this was owing to mere destitution,[1] while others assert that he was actuated by treacherous motives. But Clifford having dexterously entrapped the murderer, instantly conveyed him south, where he received a fit recompense for his offences, being, according to a writer in the fifteenth century, "drawen and hanged," and then beheaded and quartered, amid the general odium and execration.[2] Clifford having achieved this notable feat, and outwitted Serle, who had mistaken his politics, was pardoned and taken into favor.[3]

After the year 1404, when this event happened, the rumor of Richard's existence subsided, and in a great measure ceased to agitate the nation. The words of Otterburn, a cotemporary, and often quoted by Mr. Tytler, are remarkable—"*Quo mortuo (Serle) cessavit* in regno de vita Regis Ricardi confabulatio."[4] This additionally proves, what has all along been contended, that Serle was the life and soul of the enterprize, and that, in consequence of his

[1] Walsingham, p. 414.

[2] Ib. and Chronicle of London from 1089 to 1483, from MSS. in the British Museum, written in the fifteenth century, published at London 1827, p. 89.

[3] Walsingham, *ut supra*, and Speed, p. 330.

[4] P. 249.

death, the chief means of continuing it were at an end. In 1407 there was an attempt to revive the rumor, by means of placards affixed in London, which had no result of importance, but merely terminated in the punishment of the person who had been induced to perpetrate the offence.[1] However fruitless, it is not to be wondered that the repetition of the occurrence should have left an impression upon Henry, and he seems to have turned his attention to the means of checking it in future. In this very year, there is an original letter from the Archbishop of Canterbury to the Prince, in answer to communications from him on general state business, the contents of which are important. After approving of Henry's project, of demanding the pseudo-Richard of the Scots to be delivered up in his presence, he observes, that by this step they would secure a person who was truly a phantom of the vulgar, inasmuch as they were disposed to render the honor and affection due to the King, to one who, at least, had been born a domestic. He adds, that through pretext of him, as experience had shewn, contentions, risings, and variances, had often occurred, so that it had become difficult (speaking in a figurative sense,) to separate the *weed* from the grain; but, after all, it was better that there should be now a partial eradication, than that both should be allowed to grow up and ripen, the consequences

[1] Walsingham, p. 418.

of which might afterwards be prejudicial. In this way the Primate talks like a prudent statesman, guarding against the worst, well aware of the maxim, that "*parva scintilla contempta sæpe excitat magnum incendium.*" At the same time, this "famulus natus" "phantom," and "weed," as he is described, is expressly said to be *stultus* and *fatuus*, and to have personified Richard.[1] We are here, therefore,

[1] This curious original letter, the contents of which are now, for the first time, disclosed to the public, is among the Cotonian MSS. (Vesp. F. VII. fol. 88.) A full copy, at the request of the author, was kindly sent him by that able antiquary, Joseph Stevenson, Esq., lately one of the keepers of the manuscripts in the British Museum. Owing to its antiquity, the letter is, in some instances, defaced and torn; but what is preserved in reference to the present subject, shall be literally given, with certain insertions within brackets, by which it is proposed to supply deficiencies. The Primate first agrees with Henry as to the propriety of a longer truce with the Scots, but adds, that it should be under certain conditions,—" videlicet quod ipsi de Scotia [*inimicos vestre*] maiestatis non retineant, seu favores eisdem impendant, et quod *illum fatuum se dicentem Regem Ricardum* ad [*presentiam ves-*]tre maiestatis transmittant, quæ omnia sano modo fienda, reputo fore sana, ne sanguis innoxius christianus.....fundatur, et vestram excellentem discretionem quam observare intenditis in eisdem merito laudare opportet et [*stu-*]*ltum se dicentem Regem Ricardum* ad vestram presentiam transmitti affectatis, quia certe per hoc [*ejusdem persona sit*] servata plebis vestre quem merito dico *idolum*, eo quod honorem, et affectionem Regi debitos ipsi saltem [*rederent fa-*]*mulo* [*prius*] *nato*, cujus occasione tanta ut experientia docuit pluries exorte sunt inter ligios vestre Regie [*Majestatis*] contentiones, [ins-]urrectiones, et scismata, ut difficile

supplied with this additional information about the Scottish Richard, (independently of his having been a domestic,) that he was a fool or ideot; and, it is singular, that such creatures not unfrequently turn their attention to royalty, and attempt to mimic it; so what, with this tendency, and his opportunities, if, as is conceived, of the household of Richard II., of observing his manners and address, he might, to a certain degree, have been capable, in a foreign country, of enacting the part that was assigned to him. He may have been a kind of simpleton and

fuisset zizaniam seperare, quin imo aliquando partim eradicaretur ..... deb ..... re, prout nec credo fuisse sanum utrumque crevisse usque ad messem, ne deterius contigisset." Then follow other observations relative to the truces with the Scots. The letter is simply dated at Canterbury on the 23d of March, but Sir Robert Cotton has added, and there is every reason to think he is correct, " 8 Henry IV." that is in the year 1407. Mr. Stevenson informs the author, that there is neither indorsement or seal. Of course, most of his additions are presumed, but it is really difficult to make any thing else of the words " *mulo nato*," than "*famulo* nato." It would be highly desirable that the usual chemical application should be tried on this part of the epistle, to bring out more of the writing, which may not altogether be defaced. " *Idolum*," it need not be remarked, denotes a spectre or phantom, which also appears to be its meaning from the context. The use of the term " *Insurrectiones*" is curious, but it is quite clear from history, that any risings in the present instance must have been of a limited and inferior description. For greater fairness, and that the document may be considered in all its parts, a full copy is subjoined in the Appendix, see No. I.

buffoon, so frequently to be met with at courts, whom his crazy condition might have rendered the more grotesque and amusing.—The demand upon the Scots for the delivery of the impostor, may accordingly have been made, but of the result we are uninformed, no unusual circumstance, on the supposition of such application, from the dearth of Scottish memorials at the time. Subsequent to 1407 there was no further attempt openly made in his behalf. The pretext of his identity with Richard, as might naturally be expected, became a kind of watchword in the mouths of the disaffected, like any idle tale prejudicial to government,—obviously with the same view as in the case of Maudelain,—but it was only during one or two commotions on other accounts, that it was openly bruited, and even then with distrust and hesitation.

It is not improbable that the *pseudo* Richard may only have been prominently brought forward by the government of Scotland in 1406, subsequent to the death of Robert II.; for that is the earliest notice of any charge having been made for his maintenance. It appears by a retrospective entry in the Scottish Exchequer Rolls, in 1408, that the Regent, Albany, had advanced the necessary sum during the interval, and thus he became a Scottish pensionary shortly after the capture of James I. by the English, which happened in 1405. The Scots having lost their King, seem to have resolved upon a ridiculous and absurd reprisal, by affecting to shew

that they also had a rival monarch in custody; and, in furtherance of the design, the impostor, in 1408, is described, for the first time, as "King Richard" in the Exchequer Rolls, which appellation he retains there until 1417, two years previous to his asserted death, after which there is no further allusion to him.[1] The funds, it may be observed, assigned both for his sustenance and confinement, amounted to the mighty sum of one hundred merks. In the year 1404, the salary of James Wedale, a macer in Exchequer, was ten pounds, and at the same time the gown of the door-keeper there cost two pounds.[2] These facts may throw light upon the amount of the sum expended on the supposed Richard, for it is well known that a merk was much less than a pound Scots, the value of the former being only thirteen shillings and four pence of our money. Albany, too, advanced the money, for which he was P. 339. to be afterwards remunerated; and, owing to his noted rapacity, he may have made the sum much

[1] The author had seen these entries, respecting the supposed Richard, nearly twenty years ago in the Rolls in question, when he was examining them, but he cannot say that they made the impression upon him that they seem to have done upon Mr. Tytler. They actually prove no more than what we previously knew, and is vouched for by our historians, including Bellenden, that a person was nominally held to be King Richard by the Scottish government; nay, their information is restricted to this only, while the other sources are far more communicative.

[2] Exchequer Roll for that year, in his Majesty's General Register House.

larger than it was, in order to appropriate the more to himself. Hence, it must be confessed, that the Scots attempted the deception at a cheap rate; and certainly with no regard to the conceived royalty and importance of their prisoner. We are here unavoidably forced to contrast his treatment with that of James I., a real monarch, when a captive in England. The difference is striking, even as we learn from Mr. Tytler, who says that James
P. 164. I. "was provided with the best masters, treated with uniform kindness, and waited on with the honors due to his rank," and the same thing will be further illustrated in the sequel.

The next notice of Warde, in other words, the *pseudo* Richard, (and which is an original one,) further corroborates our theory. On the 29th of January 1409, Henry IV. conveys to John Edmond, one of the grooms of his chamber (unus hostiariorum cameræ nostræ) a messuage, and eight acres "terræ et prati—in *Trumpington* quæ fuerunt *Johannæ Warde* die mortis suæ, et in manus nostras occasione *forisfacturæ Thome Warde filii et hæredis predictæ Johannæ devenerunt.*" It is added, that the small subject in question was valued in Exchequer at the sum of six shillings and eight pence.[1] Johanna, the mother of the impostor, from her

[1] Patent, 9 Hen. IV. part 2, *m.* 24. From a full copy, obligingly forwarded by Henry Petrie, Esq. keeper of the Records in the Tower, to the author upon his application.

Christian name, may have been a near relative either of John Wyarde the valet, or John Warde the pavilion maker, respectively, of Edward III. and Richard II., possibly married to some cousin; and nothing could be more natural than, as in the present instance, for the King to confer the property of one domestic that had fallen into his hands upon another. The intimation of the forfeiture, name, designation, and land, with the fact of the latter having been in non-entry since his mother's decease, all identify the above Thomas with the Thomas Warde of Trumpington, the personificator of Richard II. While Henry thus took amends of Warde for seizing his crown by seizing his messuage, it will be particularly observed, that it is not said that he was dead, or had suffered for his treason,—for a very plain reason, that he was then in Scotland, and enacting the part of the *pseudo* king. This, if any thing were wanting, together with his constant disappearance in England thereafter, would be conclusive. The date of the grant also is remarkable, being the very next year after 1408, when the supposed Richard is openly declared to be a pensionary in Scotland, and first appears in such character in the public records. Henry had previously thought it beneath him to deprive so miserable a creature of his cottage; but things became different when he was thus legitimately acknowledged by the Scots, and therefore allowed the penalties of law to take their course.

During the investigations into the circumstances of the March conspiracy in 1415, the object of which was to raise Edmund Mortimer, the true heir of the Plantagenets, to the throne, it transpired that some persons had secretly cast their eyes upon "*Thomas of Trumpington an* IDEOT," of whom they were to avail themselves like another Maudelain, and *bring from Scotland* to personify Richard.[1] The attempt, however, of course, was not made, and seems merely to have been an under plot, in order to unsettle men's minds, and by its co-operation to promote the main object—the substitution of the house of Mortimer for that of the reigning family. It will be afterwards seen, that the impostor is again alluded to by the English in 1417, but he still continued in Scotland as much a *brutum fulmen* as ever, and he is finally proved to have died there by a Scottish chronicle in 1419.

Let us, therefore, now see, after having so fully traced the individual, how the case may stand. It is proved that, in 1402, one, assisted by Serle, personified Richard in Scotland; and, in 1404, both Serle and "Thomas Warde of Trumpington," are excepted from a general pardon, while the latter is expressly charged with having feigned himself to be Richard; we find by the Archbishop of Canterbury's letter to Henry IV., that the personificator of Richard was still in Scotland, and that he was a

[1] Rolls of Parliament, Vol. IV. p. 65.

*fool* and an *ideot*; next, that in 1409, the small property of "*Thomas Warde* in *Trumpington*," owing to his *forfeiture*, is given to a person apparently in the same rank with himself, by a grant in which he is not said to be dead;—in 1415, "*Thomas of Trumpington*," is explicitly shewn to have been an "*ideot*," capable of personifying Richard,—and still resident in Scotland—where, under the appellation of the Scottish impostor, he obviously figures in 1417, as will be seen in the sequel. Now, in addition to all this, when we have the statement of the Scottish Winton, a cotemporary, upon whom too, Mr. Tytler places such great reliance, and who had no access to English records or authorities, that the *Scottish Richard was crazed*,[1] while he also questions his royalty,[2] can we, under these circumstances, entertain a doubt of the identity of the latter with Warde —especially when there is not a tittle of evidence, or even plausible surmise, to shake or rebut them? It is humbly conceived that the point is established

[1] Winton gives this account of the nondescript:—

"Of Devotion nane he wes,
And seildyn will had to here mes,
*As he bare hym like wes he*
*Oft half wod*, or *wyld to be*."

Book IX. ch. xx. l. 197, etc.

Dr. Jamieson intimates, that one is said to be "wud," (the same as "wod,") who is outrageous, in a state of insanity; and then he renders "a *wod* dog," one that has the hydrophobia. See his Dictionary, *sub hac voce*.

[2] "*Quethir* he had bene king, or *nane*
Thare wes bot *few*, that *wyst certane*."

Ibid. l. 194–5.

to demonstration, and in a way not only remarkable, but hardly to be expected in a matter of antiquity.

Other circumstances, in addition to those stated, as will be afterwards seen, tend still more to rivet the conclusion,—and if the impostor Warde and the Scottish Richard were the same, and the latter necessarily not the true Richard—which it is conceived has now been fairly proved, upon whom else can Mr. Tytler affix his phantom, who he says escaped from Pomfret, and has ocasioned the present discussion?

It may be only here added, that a "Tractat of a part of ye Ynglis Cronikle," printed at the Auchinleck Press, from the Aslowan Manuscript, states, in reference to the supposed Richard, that he "deit a *beggar*, and *out of his mynd*, and was erdit in ye blak Freris in Striviling." It is curious that, two years before the death of the latter, his pension was stopped, the Scots being at last tired of the imposture;—hence, besides being an ideot, he became a beggar, with the most perfect truth. This fact is proved by the Scottish Exchequer Rolls, and, indeed, previously he had only been a pensionary.

Warde, in this manner, is proved to have remained in Scotland until the moment of his death, and it would have been indeed cruel to have advised him to quit it. Of a truth, tarrying there was much better than flying thence; condign punishment little short of the severest martyrdom had awaited him if he had formed such an idea, and attempted to breathe

the air of the south. There was little chance, like the Scipio of Le Sage, of clandestinely escaping with his royal trappings; but, after all, the situation of venerated counterfeits is far from disagreeable—the deified crows of Lisbon, the "*honorati corvi*," became sleek and fat in their gemmed receptacles, and were treated with such attention and respect, that it was deemed profanation to touch them. In the same way, the pseudo Richard may have enjoyed pleasant solace at Stirling, with little fear of starvation amid the mazes of the Forth; and his vanity would be gratified by adoration, whether real or affected. He was, at any rate, in a different predicament from the rustic, who, being caught by a showman, was made to personate a sea-monster in a cold bath, where, in a shivering condition, he displayed his melancholy antics to the amazed spectators.

Mr. Tytler observes that the Scottish Richard, when taxed in the kitchen of the Lord of the Isles by another fool—for there is much wildness in the story—with being the true Richard, actually denied it. This is a fact upon which he lays great stress, and he does not envy the task of that person who, after this incident, would undertake to prove him an impostor. But really, notwithstanding the arduous labor that is thus imposed upon him, the author must contend that the answer is plain.—If, as is uniformly stated, the former was crazed, we might expect *any thing* from him; and, in the kitchen in question, amid Celts, Scots, and Norwe- P. 327–8, and 331.

gians, and the ridicule consequent upon his royalty —giving credit to the story—he might in a fit of sullenness common to ideots, have denied his *status*, to save himself from persecution and annoyance. Or, supposing him to have retained a *certain portion* of intellect, he might have seen that this was not the place best suited to his new dignity, as he was in the habitation of an ally of Henry IV., and, therefore, reserved his secret for a better occasion. As fools, however, are held to be inspired, the fatuity of the co-ideot might have gained for his remark a degree of credit it would not otherwise have received, and thus paved the way for the deception. These adventurers, as in the case of the pseudo Nero among the Parthians, made their *debut* in very remote regions, in order that Serle might feel the pulse of the nation; but, when the project had ripened by his explanations and address, they would, doubtless, direct their faces to the north; whatever we can gather about them or their motions, only tends to support our theory.

Mr. Tytler asserts that Henry IV. never solicited the Scots to deliver up the supposed Richard, which he thinks he could not but have done, had he been an impostor, in order to expose the deception, while, on the other hand, his avoiding the step, betrays a distrust of the imposture, and a belief in his reality. This assumed fact, and the mode of the burial of Richard, he founds upon as two great arguments upon his side. But, from the original

P. 363—386—353.

letter of the Archbishop of Canterbury to Henry which Mr. Tytler had not seen, it may be evidently inferred that the Prince applied for his delivery;—this, at least is certain, that the thing had been resolved upon by him, with the subsequent concurrence of the Primate. The Archbishop, while acknowledging the receipt of the King's communications, and stating that he had well considered them, observes, " quod *voluntatis vestre* est, et sani consilii," that the crazed impostor should be demanded of the Scots, and brought to the presence of the King. He then adds, in reference to this, and other matters, " et vestram *excellentem discretionem quam observare intenditis in eisdem* merito laudare opportet." The Primate's letter is thus quite laudatory, and simply approves of what Henry had suggested, which fully fixes the important fact, that the measure in question had fearlessly come from him. This piece of evidence is of great weight, because it turns out that, in a *private* confidential correspondence between the parties, where there was no need of concealment, and where the difficulties in the case, supposing there to have been any, would be fully canvassed—the delivery of the impostor by the Scots, is not only sincerely desired, but is actually to be in the presence of the King—who here betrays no distrust or hesitation, but wishes directly to confront him. Why the demand—holding it to have been made—does not transpire, may have been already explained; and, after all, such a request by

See Appendix No. I.

Henry, with which the Scots would not have complied, might have attached too much importance to an incident, which, as Otterburn informs us, ceased after 1404 to be a subject of conversation. If the principle in war be good, to make a golden bridge for a flying enemy, it must equally hold in the case of silly rumors against government that are sinking in public credit, any notice of which would only lead to revive them. It was therefore, perhaps, better policy to allow the deception to die a natural death, and to refrain from any step, either by insisting upon the delivery of the impostor, or otherwise, that might elicit such a consequence.

It is not a little remarkable, that Winton, although he gives several particulars about the supposed Richard, is utterly at a lose to account for the manner in which he contrived to escape from Pomfret Castle.[1] Mr. Tytler fancies that, owing to the fear of offending Albany, he was afraid to tell the whole truth—but this seems to be another of those theories in which that writer indulges, when he finds himself in a difficulty, and it is little likely that Winton, who could have no interest in the matter, and being a Scot, could have apprehended no bad consequences from the freest disclosure—after having been rather diffuse in the other circumstances of the story, should all at once have stopped short, and

Book IX. ch. xx. l. 164–5.

[1] "*Bot I can nocht tell the case,*
Off Pomfret *as he chapit wase.*"

withheld from us the point and cream of the whole. The truth is, as he himself affirms, that he knew nothing about the matter; which, together with the falsity of the escape, fully accounts for his silence. Mr. Tytler thinks he has made a notable discovery, when he has fixed that, of the two keepers, to whom, according to the former, Richard was delivered at Pomfret, Waterton was steward of that honour, and Swinburn employed by Henry IV. upon an important embassy, while both were in "the confidence and employment" of the Monarch. But does not this of itself shew the extreme improbability of their permitting the escape of Richard, and necessarily of its occurrence, which would directly have estranged their master's regards from them, and completed their ruin? Yet, from what we can gather, they still continued in favor with Henry after the supposed event, which, if it had happened, he would not have failed severely to have revenged upon them. There is no proper proof, however, of these persons having been the jailors of Richard, although it would seem that there is a modern unsupported tradition, that one of them was so among his descendants,—but even admitting the fact, and that Winton is here correct, it is very evident that the circumstance might have been divulged by Serle, who was sufficiently communicative when in Scotland. Mr. Tytler positively affirms, "that, according to the evidence of Winton, Richard was delivered to two gentlemen of the name of Water-

P. 335.

P. 335, note.

P. 366. ton and Swinburne, *who spread a rumor of his escape.*" In the latter part of the assertion, he is quite incorrect, for neither Winton, as will be seen at a first glance, or any other, drop a hint of the kind; it would, indeed, be ludicrous to admit it, for would the persons in question, the sworn dependents upon Henry, faithless and inattentive to their interests, have been guilty of such glaring folly, of such a suicidal act, as would at once have published them to be traitors to the world? The rumor thus spread could only be to aid Richard, and it is well known that those circulating rumors injurious to the existing government were accounted traitors. The whole of Mr. Tytler's argument is strange and inconsistent. He represents the Earl of Northumberland as having afterwards seized and strictly imprisoned Waterton, in order, as he *fancies*, to force him to reveal the story of Richard's escape, and to

P. 366-7. ascertain "whether the king actually had died in Pomfret Castle, or might still be alive in Scotland." But, according to his account also, as has been above shewn, this party, with his friend Swinburn, even sillier than the crow in the fable, had already allowed the cheese to drop from their mouths without any cajolery or persuasion. It was hence unnecessary to put either in durance or captivity, or to use harsh measures towards them, when they were so wonderfully free and outspoken, and required no wrestling or compulsion, as in the case of the person of antiquity, to engage them to "sing out;" and

put Northumberland in possession of what must have appeared to him equally sweet and delightful with his notes. We may fairly presume, however, that the seizure of Waterton by the Earl, was, for a manifest reason of a very different kind—his being a friend, and attached servant of Henry IV., and adverse to any attempt against him, such as was then devising by the former. It may be only added, that no writer or historian has favoured us with a single speculation as to how Richard may have escaped from Pomfret, which is an argument not only against the truth, but the bare supposition of the event.

During the whole time that the Scottish Government detained Warde, or the pseudo-Richard, it is unquestionable that they did not venture to make a hostile exhibition of him. As is proved by the Scottish Exchequer rolls, he was kept in close custody, and not allowed to exceed the bounds of his imprisonment. This is fully explained by the circumstance of the imposture; if brought into view, his madness and ignorance, if not appearance also, would soon have unmasked him; and hence it was impracticable to send him to the borders, or to enable him to act against England. All that was feasible was evidently attempted—to keep him in confinement for fear of discovery, while it was circulated abroad that he was the true Richard, which rumor, although palpably false, might lead to their advantage, and have the effect of creating a sensation elsewhere; but beyond this, his utmost powers of annoyance

ceased,—he was merely able to fan the embers of partial discontent, and to agitate the vulgar, but not certainly to excite a rebellion, far less to figure as a Perkin Warbeck, or even as an adventurer, on a much lesser scale. What is also remarkable, his seclusion in Scotland was not owing to any wish of the Regent Albany to conciliate the English, or in consequence of an interested system of forbearance, because it is proved, independently of other things, by a letter of Henry V.,[1] that Albany, in 1417, had conspired with his enemies, to despatch the pseudo-Richard to England with hostile intentions.[2] The latter, here, is appropriately styled the "*Mamuet*" (that is, the impostor or puppet) "*of Scotland.*" The will, therefore, of making the most of the phantom, was not wanting to Albany, but merely the power, and accordingly, however he might threaten, he could not act, and, therefore, while he fed his allies with such vain hopes in order to annoy the English, the enterprize, as it is hardly necessary to add, being quite impracticable, proved abortive.

It is very observable that Albany is thus clearly shewn to have kept no measures with Henry V., of which that Monarch was well aware, and this, with

[1] Referred to by Mr Tytler, from Mr. Ellis's Original Letters, and another source. See Remarks, p. 381. It is really a curious document, and Mr. Tytler ingenuously informs us, that it was pointed out to him by his learned friend, Mr Urquhart.

[2] The words are, "to stir what he may."

the enmity of the English, fully shews that the two countries were as much embroiled as ever, and ready to take every advantage. Mr. Tytler, as if aware of so evident a conclusion, in the face of his own authority, which he thus seeks to disprove, *supposes* that Henry was here "*misinformed*,"—that Albany had *no* accession to this plot, *and that it was the faction hostile to him who were implicated in it!* He might maintain, upon equal foundation, that Albany was Henry, or Henry Albany, for this is pure conjecture; and, as he here appeals to nothing, it may share the fate of his other assumptions. He affirms that the letter of Henry contains "proof in support of my *(his)* theory of Richard's *escape*"—this is indeed still more inexplicable—this is illustrating *obscurum per obscurius*, on the other hand, while there is no pretence of such a thing, direct evidence is afforded to the contrary, as it instructs that the Richard in Scotland was not the true Richard, or he who is supposed to have escaped from Pomfret, but an arrant puppet and impostor. He finally attempts to console himself for the little luck attendant upon this document, by remarking, that it is "valuable *in another way*, as it neither pronounces the "Mamuet" to be an ideot, nor identifies him with Thomas of Trumpington." The argument is again difficult to fathom—the inference he would wish to draw would seem to be equivalent to this—that because Thomas of Trumpington may on one occasion have been merely styled

P. 381.

Ib. note.

P. 382.

an impostor, he was not an ideot or Thomas of Trumpington; the cases are virtually similar, and by what ingenuity or rhetoric he can render it subservient to his purpose, it may, indeed, puzzle us to imagine.

It need not be again observed, that it has been proved by satisfactory evidence, that "Thomas Ward of Trumpington in *Scotland*," or "the Scottish impostor," was both an ideot and impostor—which last term is synonymous with *Mamuet;* he, therefore, it is apprehended, must be the same with the "Mamuet of Scotland" in 1417, there having been, as is quite obvious, only one personificator of Richard, or impostor of this kind, in that country. Pp. 736—7. Mr. Tytler elsewhere attempts some additional refinements of this nature, which, after what is stated, it is unnecessary to notice, as they thereby are refuted. It would seem as if he were conscious of the importance of the evidence that had been adduced by the author in reference to Ward, and naturally enough, finding himself in a dilemma, has recourse to every subtilty and cavil to elude it.

The conduct of the Scots towards the *pseudo*-Richard is strikingly contrasted with the treatment of James I. by the English, of whose reality there could be no doubt. They had no scruple in exhibiting him upon all occasions—they not only recognized him as a prince, but actually treated him as one, giving him the seat of honor beside Catherine, the wife of Henry V., at the festival of

her coronation;[1] nay, they even carried him into France, and displayed him in front of the English and French armies, that his mere presence might recall his subjects from the French ranks, and induce them to side with the English. It is further remarkable, that many of the Scots resorted to James during his captivity, that they might behold and converse with their lawful monarch, nor does it appear that access was denied them. On the contrary, he is proved by an autograph deed, still extant, to have confirmed his possessions in Scotland to Sir William Douglas of Drumlanrig, who happened then to be in England.[2]

[1] This we learn from a document subjoined to the Chronicle of London, formerly referred to, at p. 162. It thence appears, that "The King of Scotland sate *in his estate* upon the left side of the Queene," and below him the Duchess of York, Countess of Huntingdon, &c. &c. The Earl of March, the true heir of the crown, kneeled "upon the deys on the right-side of the Quene, holding her sceptre." This curious paper specifies minutely the three courses of the entertainment, more varied, and perhaps recherché, than could have been supposed. There are dorreys, turbet, soles, with mullet, a mete in paste with III angels in fourme of Sent Katherine, creme motley, a tyger looking in a mirror, a pelican in her nest, &c., while knightly devices and legends are scattered among the decorations, extremely gallant and edifying. Sir John Steward, probably a Scot, acts as "Sewar" to the Queen.

[2] Dated at Croydon last of November 1412, Queensberry charter-chest. *A propos de bottes*—in the enumeration of the family of this distinguished prince, it is not a little singular that Mr. Tytler, although he gives notices respecting some of them,

in conformity with the ordinary dictates of human policy. To retract their error would have proved them in *mala fide*—affected them in their diplomatic relations, and thrown suspicion in future over all their declarations. History is not without examples of an analagous kind—neither nations or individuals are apt to make a recantation, or confession that may tend to mortify their pride, impeach their credit, or wound their prejudices. What greater hallucination can be conceived than that the King of England was King of France for centuries back? yet that empty boast, owing to its being once made, has been pertinaciously clung to, and not abandoned until modern times. The monument in London, to flatter certain prejudices, "like a tall bully, lifts its head and lies;"—and England, although subdued by the Norman bastard, "never lay at the proud feet of a conqueror," &c. To descend to private life, the circumstances of the Rohan imposture are not a little in point.

Margaret, Duchess of Rohan, the daughter of the celebrated Sully, having no male issue by her husband Henry Duke of Rohan, and having conceived an enmity to her daughter, and the family into whom she married, produced, at the distance of seven years after her husband's death, a stripling whom she called Tancred, and declared to be their lawful offspring, and the heir to the Rohan honors and estates. The thing of course gave rise to litigation, and after full discussion it was decided that the

youth was a mere counterfeit and impostor, and had no right whatever to his assumed status.

Subsequently to this Tancred died, but the Duchess would neither retract her assertion, or acquiesce in the judgment, but, still maintaining the deception, applied to the Magistrates of Geneva for permission to bury Tancred at the side of her deceased husband. At such request the Magistrates were surprised and difficulted, but the Duchess had the address to obtain from Lewis the Fourteenth, a declaration that he would not take it amiss if her desire were complied with. Accordingly, Tancred's body was brought to Geneva, and buried beside the Duke of Rohan, with a suitable inscription over the grave.[1]

The Scottish government, partly from similar motives, acted in the case of the pseudo-Richard; and it is evident, if a person, at a distant period, had perused Tancred's inscription without knowing more than might be gleaned from antiquarian report, or dubious *indicula*, he might, in the same way with Mr. Tytler, have inferred that Tancred was the true heir of Rohan, although nothing possibly could be more fallacious. It is, besides, very difficult to remove a bias that has once seized upon the minds of the vulgar. At the very time when the pseudo-Richard lived, they would not believe that Hotspur had fallen at the battle of

[1] See Les Plaidoyers de Gualtier, pages 291, &c—de Patin Dict. des Arrets *voce* Supposition, V. vi. p. 443.

Shrewsbury, and it was actually necessary to disinter his corpse, and to expose it upright *between two mill-stones*, in order to undeceive them.[1] Now, independently of the singularity of the procedure, as parts of the person were clearly concealed, (as in the case of Richard II.) according to Mr. Tytler's mode of reasoning, such peculiar exhibition argues deception, and could be nothing but an artful expedient to put down report, and mislead the public mind—or, to use his own words,—" My answer is, that the whole was a deception got up for the purpose of blinding the people, but, when narrowly examined, betraying the imposition in a very palpable manner," &c. Although Mr. Tytler might contend to this effect, as relevantly on the present as the former occasion, yet notwithstanding the suspicious circumstance in question, and the pains taken to influence the people, no historian has yet doubted of the fall of the gallant and impetuous youth in the preceding fatal conflict. We may here allude to rather a compendious method of the learned gentleman, to free himself of vexatious and unanswerable objections. He affirms, that the instrument in 1404, in respect to the personification of Richard

Pp. 349—51.

[1] " And forasmuche as som peple seyde that *Sir Henry Percy* (*Hotspur*) was alyve, he was taken up agen out of his grave, and bounden upright betwen to mille stones, that alle men myght se that he was ded."—Chronicle of London, formerly quoted, p. 88.

II. by Thomas Warde of Trumpington, "*was one* P. 376.
*of those forgeries* which this monarch did not scruple to commit, to serve his political purposes;" and he elsewhere contends, that it was not a solitary in- P. 362.
stance of such degrading and unknightly conduct upon his part, but that he had been habituated to P. 385.
the practice. He adds, that *he will afterwards* P. 362.
*shew this;* but alas, it is but an empty promise, to stay our antiquarian cravings, for we are doomed to go hungry away without their being in any wise appeased. Nay, having disappointed us in expected information, he even coolly leaves the matter in our hands, and tells us to shift for ourselves.[1] With whatever efforts he may attempt to buoy himself—and these, indeed, have been already exposed—it is quite evident that he, at least, *has* adduced nothing

[1] Mr. Tytler agreeably surprises us with stating, that it had been his intention, by means of "diplomatic correspondence" between Albany and Henry the Fourth and Fifth, to found "a strong presumption that Albany was in possession of the true Richard." This, indeed, must be a curious antiquarian discovery, and above all price, but our mortification may be easily conceived when he puts this *finale* to his announcement.—"The limits, however, within which I must confine these observations, will not permit me to accomplish this; *and any intelligent reader* who will take the trouble to study this correspondence as it is given in the Rotuli Scotie, *will not find it difficult to discover, and arrange the proofs for himself.*" *Hist.* Vol. III. p. 373—4. It may be owing to our own stupidity certainly, but we must honestly confess, that without Mr. Tytler still condescending to assist us, the task, which he thus imposes upon us, will be insurmountable.

in support of the previous allegation, which, therefore, resolves at present into mere assumption. The direct charge of forgery against an ancient document, as in the present instance, of more than four hundred years standing, is rather a bold experiment, and must require some extraordinary, nay, almost miraculous evidence in its support. In the "Marian Controversy," the device was often resorted to, as will always happen in controverted points of moment, but much, indeed, to the satisfaction and edification of the world! The difficulty of the charge brought such mode of argument into disrepute, and it is now rather regarded as a display of ingenuity, than leading to solid conviction. On other occasions, Mr. Tytler is far more punctilious, and acts so hypercritically, that even legal evidence will not satisfy
P. 382. him. Hence, we are not to believe the "*Mamuet*," or "*Impostor*" of Scotland, to be the *ideot* Impostor of Scotland, and the *personificator of Richard*,—while the description of "Thomas of Trumpington," forsooth, *under these peculiar appellations*, is not sufficient to identify him with either!—we are bound to produce farther proofs of their reciprocity, and, for any thing we know, the attestations of his godfather and godmother, if not nearest blood relatives! As for a remaining cavil, upon which, as has been shewn, he lays stress—the silence of one or two
Ps. 317–8, 362–376. historians with respect to a fact, although known to the remainder—which he thinks fatal to its reality—it is just what might be expected in any event, for

the reverse would be unnatural, and contrary to human experience. There is no doubt that Lewis the Sixteenth actually fled to Varennes, and the fact, and its unfortunate issue, are alike indisputable; yet it has been strikingly remarked, that hardly one attendant gives the same account of the matter, and while there are strange discrepancies, and contradictions in essential points, some detail incidents that have *escaped* others, nay that are entirely *suppressed* by them.[1] If uncertainty in this manner, prevails among immediate spectators, it must hold, *a fortiori*, in collateral, and hearsay testimony.

Imposture was extremely common in the fourteenth century, it was indeed the fcible and illusion of the age. We moreover learn from an old chronicle, that "John Tanner sayde he wes King Edward the I. sunne,[2] so taught by a Dyvile that promised hym to be King."—So ambitious and evil-minded this person was, it however adds, "but at last he was hangid at Northampton."[3] The instance too of Maudelain is in point, and if he had not fortunately been dispatched in the same way, he would have troubled us with the refutation of another theory as tenable as the one we have been engaged in discussing. It is rather singular, that much about the same time there should have been, if we may so ex-

[1] See the various and interesting French pamphlets that have been written in this controversy.

[2] i. e. Edward the First's son.

[3] Lel. Coll. Vol. II. p. 473.

press ourselves, three Richards—the real Richard—the Maudelain Richard,—and the Scottish or ideot Richard—so strangely has the former been multiplied through the prism of fancy and credulity.

Any summing up of the particulars connected with the present subject, is hardly necessary. There is first the direct fact of the death of Richard II. in 1400, established by proof that is rarely to be found in points of such antiquity—then there is the strongest circumstantial evidence, to the same effect, derived from unavoidable inferences and conclusions, and whatever can be gleaned—while, independently of this, it now appears that the Scottish, or pseudo-Richard, was no other than a crazed individual—Thomas Warde of Trumpington. In short, what we were disposed at the outset to give as a theory, may be now held to be converted into a reality; and we may well conclude, in the quaint words of honest Speed—that this "fond fable, (Hector Bœtius' tale of Richard's escape to Scotland, &c.) hathe neverthelesse somewhat in it, for *that some personated* Richard; might soe doe is neither impossible nor improbable, *and indeed it was so.*"[1] The thing, in fact, appears to have been a plot devised and executed by underlings in Richard's household.

[1] Chronicle, p. 614.

# APPENDIX.

## No. I.

LETTER OF THE ARCHBISHOP OF CANTERBURY TO HENRY IV.

Christianissime princeps, debita atque humilima recommendatione premissa, Receptis pridem literis vestre Serenissime maiestatis, una cum literis ducis Albanie, sub vestre excellencie signeto transmissis, ipsisque inspectis, et iuxta capacitatem meam efficaciter .... sceratis, eisdem vestre serenitatis literis intellexi quod voluntatis vestre regie est, et sani consilii ut truge alias capte cum Scotis . . . . . rs festum Pasche continuentur, et renoventur pro uno anno proximo ex tunc futuro, et interim Commissarii . . . . . de pace perpetua, seu saltem longis treugis, cum certis tamen conditionibus, videlicet, quod ipsi de Scotia . . . . . maiestatis non retineant, seu favores eisdem impendant, et quod illum fatuum se dicentem Regem Ricardum ad . . . . . re maiestatis transmittant, que omnia sano modo fienda reputo fore sana, ne sanguis innoxius christianus . . . . . fundatur, et vestram excellentem discretionem quam observare intenditis in eisdem, merito laudare oportet, et, . . . . . ltum se dicentem Regem Ricardum ad vestram presentiam transmitti affectatis, quia certe per hoc . . . . . servata plebis vestre quem merito dico ydolum, eo quod honorem et affectionem Regi debitos ipsi saltem . . . . . mulo . . . . . nato, cuius occasione tanta ut experientia docuit, pluries exorta sunt inter ligios vestre regie, . . . . . contentiones . . . . . urrectiones, et scismata ut difficile fuisset

zizannia seperare, quinimo aliquando partim eradicaretur . . . . . deb . . .re prout nec credo fuisse sanum utrumque crevisse usque ad messem, ne deterius inde contigisset. Sane metuendissime Princeps, quo ad plenum consilium per me ad premissa exhibenda, seu literas ad eadem prout mandatur fiendas, si bene concipio non potero absque ulteriori informatione eorundem qui modum formam et effectum treugarum captarum apud Kelsowe noverint, congruum dare responsum ; seu scribere competenter, pro eo presertim quod litere dicti Ducis Albaniē ad ipsos modum, formam, et effectum, se referunt, de quibus credo venerabilem fratrem meum Episcopum Dunelmensem, et alios qui sunt de consilio Londoniensi, qui habent forsan copias illarum treugarum, et aliorum tractatuum, fore plenius informatos. Vestram igitur excellentissimam maiestatem si libeat, et videatur expediens, supplico, et exoro quatinus usque ad diem martis ad septimanam, premissa differre velitis, quo die ero, deo dante, Londonia, et cum predictis communicabo, et faciam, domino concedente, bonum finem, quod si eidem vestre serenitati non videatur expediens tantum diferre, eadem iterata prece vestre regiē excellentie supplico, quatinus prefato venerabili fratri meo Dunelmensi Episcopo, et aliis, qui premissas treugas noverunt, et habent copias sive originalia eorundem mandare velitis, ut una cum avisamento clerici Rotulorum,[1] seu ejus locum tenentis qui habent modum scribendi, et presertim in talibus ad magnum sigillum vestrum faciant literas . . . . . vestris literis regiis nominatis in delicta forma, et ad hoc sufficienti et apta, ipsasque literas sic conceptas quam citius vide . . . . . expediens, sub literis vestre maiestatis clausas, michi transmittere dignemini sigillandas, hiis meis humilimis precibus inclinati. Et quia iam instat festum Pasche quo priores treuge finiuntur, ita quod impossibile sit novas treugas expedire tam cito, videtur michi sanum fore consilium ut eiusdem vestre maiēstatis litere private aliquibus dirigantur cum verbis excusatōriis, prout expedire videbitur,

[1] Mr Stevenson adds, that the reading of this word is rather doubtful, it being nearly defaced in the original.

qui unam abstinentiam guerrarum pro mediō tempore inducant cum effectu. Vestram regiam maiestatem in prosperis dirigatur, regat, et gubernet, qui cuncta bona creavit. Scripta apud Cantuariam XXIV. die Martii.

Vestre maiestatis humilimus orator T. Cantuariensis.

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## No. II.

### PARTICULARS ABOUT ANNABELLA DAUGHTER OF JAMES I., &c., WITH INCIDENTAL ALLUSIONS TO HER SISTERS.

However Lewis the Eleventh of France may have conducted himself in respect to his wife Margaret, the eldest daughter of James I. of Scotland, it would appear that Charles, his father, at one time took a friendly interest in her relatives, and may have been the means of procuring them rather advantageous alliances. There is a letter, by Charles in 1448,[1] addressed to Sigismund, Duke of Austria, Count of Tyrol, in which he approves of the marriage that was to be contracted by him with "Alienoram filiam Serenissimorum quondam Regis, necnon sororem præsentis Scotorum, nostrorum carissimorum fratrum." He then adds, that certain delays had occurred in the transaction "quia consensus dicti carissimi fratris nostri Scotorum Regis erat necessarius, ad cujus præsentiam quondam nobis fidos destinavimus, qui prout nobis nuntiaverunt, rem gratam acceptamque habuit, tum etiam id carissimis consanguineis nostris *Britanniæ et Sabaudiæ ducibus, quibus sorores* ejusdem *carissimæ* nostræ Alionoræ *junctæ sunt*, notificavimus,"[2] &c. The mo-

[1] From MS. D'Herouval, ap. Spicilegium Dacherii, Vol. VII. p. 252.

[2] It was to the son of the Duke of Savoy, to whom this sister was contracted in marriage, as will be seen, and not to the father, whose title, however, as in the case of German Princes, may have been also taken by the former.

natch expresses his regard for the duke, and while he kindly styles him his son, informs him that Alionora and he had been contracted together *per verba de futuro* under certain conditions which waited his ratification. From this it would appear, that Alionora was then at the French court. The marriage, as is well known, took place, and Cox remarks, that Sigismund had no issue, either by her or a subsequent wife, but left fourteen natural children, which was unfortunate, because he adds, that he "was the poorest prince of his time."[1] Isabel Duchess of Brittany, above alluded to, was certainly the second daughter of James I., and there are documents respecting her in Argentæus's History of Brittany.[2] The princely house of Rohan, the pink of the old noblesse of France, owing to their descent from her, have always quartered the royal arms of Scotland. The remaining sister, here styled wife of the Duke of Savoy, may next attract our attention.

The marriage of this princess, had been fixed at Stirling on the 14th of December 1444, with Lewis Count of Geneva (who had only then attained his eighth year), afterwards Duke of Savoy, in presence of the ambassadors of his father, who had been dispatched from Savoy for the purpose. She was conducted to that country in 1455, but thereafter, owing to certain intrigues, as is asserted of the French court, the marriage between her and Lewis was dissolved at Ganat in Bourbonnois, on the third of March in the same year,[3] upon conditions, which will appear from the following letter of James II. It is given by Guichenon, from the original, in the public archives of Savoy.

"Jacobus dei gratia Rex Scotorum, universis ad quorum notitiam præsentes Literæ pervenerint, Salutem. Sciatis nos intellexisse pleneque concepisse effectus, conventiones et concordias initas et fac'as in Oppido Gannasii die vigesima tertia mensis Martii, anno Domini millesimo quadringentesimo quinqua-

[1] Hist. of House of Austria, Vol. I. p. 237.

[2] Lib. ii. c. 13.

[3] Guichenon's *Histoire* Genealogique de la Royale Maison de Savoiè. Vol. II. p. 111—12.

gesimo quinto, secundum Regni nostri computationem, inter Reverendum in Christo Patrem Thomam Episcopum Candidæ Casæ, Consiliarium, et Ambassiatorem nostrum, procuratoremque ad hoc specialiter deputatum, et Egregium Virum Dominum Jacobum de Comitibus de Valpergua Cancellarium, ac Procuratorem Illustrissimi Principis Ludovici Ducis Sabaudiæ, ad hoc etiam specialiter deputatum, super *receptione*, et *reductione Inclitæ Sororis nostræ Germanæ* ANNABELLÆ ad Regnum nostrum, necnon de consensu partium infra scriptarum, ad dissolvendum, et acquittandum omnes conventiones, contractus, et appunctuamenta super matrimonio contrahendo inter præfatam nostram Inclitam Germanam Anna-bellam, et *Ludovicum secundo-genitum prædicti Illustrissimi ducis Sabaudiæ, Comitem Gebennarum*, alios habita stipulata aut compromissa, ac etiam super *aquittatione summæ viginti quinque millium scutorum auri* pro *damnis*, expensis, et *interesse, et statu dictæ sororis nostræ*, manutenendo nobis et dictæ nostræ sorori per dictum Illustrissimum Ducem Sabaudiæ concessæ, prout in Instrumentis publicis desuper confectis latius continetur. Quas quidem conventionem et concordiam per prædictos Procuratores, et procuratorio nomine factas, secundum vim, formam, et continentiam earundem, laudamus, approbamus, ratificamus, et confirmamus. Datum sub magno sigillo nostro apud Perth septimo die mensis maii, anno Domini millesimo quadringentesimo quinquagesimo sexto, et regni nostri decimo."[1]

In this way James consents to the return of his sister to Scotland, on condition of a kind of damages being paid for the disappointment of her prospects, and the expenses she had incurred; after which he is willing, overlooking an affront—which he, indeed, could not avenge, to receive her to his fraternal arms.

The next intimation we have of Annabella, no longer destined to be allied to princes, is as the wife of George Lord Gordon, afterwards Earl of Huntly; under which character she figures in a charter, dated 10th of March 1459.[2] But her evil des-

[1] Ib. *Preuves*, Vol. IV. p. 386.

[2] Reg. Mag. Sig. Lib. 5, No. 91.

tiny still attended her; and, on the 24th of July 1471, she was solemnly divorced from Lord George, for no offence or misconduct on her part, but merely because her spouse "carnaliter cognovit quandam Dominam Elizabeth de Dunbar quam duxit in matrimonium, et ab eadem postmodum judicio Ecclesiæ legitime devortiatus et separatus, dicte Domine Anabelle in tertio et quarto gradibus consanguinitatis attingente; et sic se invicem Dominus Georgius, et dicta Anabella in consimilibus tertio et quarto gradibus attingunt."[1] The parties, therefore, owing to the marriage of one of them which had been set aside, were held to be within the forbidden degrees of affinity, which rendered their connection incestuous, and hence illegal.

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By the Princess, who is often erroneously styled Johanna, Lord George is commonly said to have had several sons, (independently of daughters,) the eldest of whom continued the line of Gordon, but a copy of Ferrerius, referred to by Gordon, in his history of the Gordons, while it states she was repudiated, represents her as only having had a daughter to him, who was married to the Earl of Errol.[2] Other transcripts of Ferrerius adhere to the prevailing account. It can be fully proved, that Alexander Earl of Huntly, son and successor of Lord George, was at least of age in 1490, when his sisters, Margaret and Catherine, were offered in marriage to the Earl of Bothwell. The matter may require a little more illustration;—admitting, however, the descent of the latter and subsequent Earls of Huntly from Annabella, the *bona fides*, as may be presumed on her part, would save their legitimacy. With respect to the Princess, she seems to have been doomed thereafter to a wretched obscurity. The divorce in question being pronounced, the bans of the marriage of Lord George with Elizabeth Hay, daughter of William Earl of Errol, were proclaimed in the church of

[1] Gordon Charter Chest.
[2] Vol. I. p. 97.

Fyvy, on the 18th of August 1471,[1] but being now so notorious a jilt (for these divorces were mere pretexts to void unpleasant alliances) it is not to be wondered at that Nicholas Earl of Errol, the brother of the lady, was disposed to use due precautions. Accordingly, by a contract between them, George Lord Gordon, binds himself on the 12th of May 1476, that "I sal never presume til hafe actual delen wyt the said Elizabet, nether be slight nor myght, nor any other manner, on to the tyme it be sene to the said lord Nichol, and her other tender friends, that I may hafe the saide Elizabeth to my wife lauchfully, and this before thir witnesses," &c.[2] It thence transpires, that although the bans had been proclaimed between them in 1471, the marriage was not consummated until after the 12th of May 1476, which has been probably owing to the doubts entertained of the legality of the previous divorce, and the survival of the Princess down to that time.

The Earl was thus fixed to Elizabeth Hay, his last wife, who survived him, by measures that appear to have been called for. The first lady, whom he had treated cavalierly, was rather a great personage, being no less than Elizabeth Dunbar, Countess of Murray, the widow of Archibald Douglas, who in her right, as far as can be seen, enjoyed the title of Earl of Murray. The fact is instructed by their marriage-contract, which is extant, and as it is curious and illustrative of the manners of the times, the substance of it may be here given :—

Indenture, dated at Forres, 20th of May 1455, "betwix Alexandere erle of huntelee, lord of gordoune, &c. and his spouse Elizabeth Countasse of hunetelee, and *George*, Master of huntelee, Knyt, sone and aperande ayre to ye said lord and lady, &c. —and ane nobill lady Elizabeth[3] Countasse of Murra, nicolas of Sutherlande capitane of Ternvay, Sir Richard of holand, Chaun-

[1] Gordon Charter Chest

[2] Errol Charter Chest. He swears this upon the Bible, &c.

[3] It is well known that her surname was *Dunbar*.

tor of Murra,[1] James of dunbar, Alexander Fleming, huchone of douglas, and William Inglis *men* to ye said lady—(by which it is agreed that) ye said George sall marry and have to wife ye said Elisabeth Countesse of Murra and *nane utheris indurand hir life*, and mak ye dispensation of ye auctoritee of our haly fader ye pape, be uptenit in all guidly hast in ye sickerest fourme of all impedimentis yat apperis or may appere betuix yame, sua yat yai may lauchfully complete ye said marriage, and in ye mentyme he sal not constrenzie ye said lady to carnale copulation bot of hir free will. Alsua ye said ladyis men, now living

[1] We are here, it is believed, presented with the author of the Howlat, exactly where he might be expected, in the retinue of his patroness. P 271. Lord Hailes, in his notes to the selections from the Bannatyne Collection, states that Holland dates the poem from *Ternoway*, the seat of the Earls of Moray; and says,

> "Thus for a *dow of Dunbar* drew I this dyte,
> *Dowit with a Douglas*, and baith wer thay dowis."

The lady, he adds, here meant is Mary Dunbar, Countess of Murray, who brought that earldom to her husband, Archibald Douglas, a younger son of James the Seventh, Earl of Douglas." His Lordship, like other writers, mistakes her Christian name, which was Elizabeth, and not Mary. He thinks, that the poem was composed before the battle in 1455, where the Earl fell.

Mr. Laing, in his able and interesting edition of the Howlat, has given us a later notice of Holland in 1481, from which it appears that he was Preface, p. viii. then in England, and accounted a traitor, evidently owing to his connection with the Douglasses. He is there described as Sir Richard Holland, *Priest.* The above are the only notices of *the Poet, as is conceived*, distinct from his writings, and a brief allusion to him by a brother bard. His Christian name, and profession, indeed, are not precisely known, but there is every reason to believe, under the circumstances, that he was the identical Sir Richard the priest, and "Chantour of Murray." In all probability, as Mr. Laing remarks, he was either an Englishman, or of English descent, for the surname is foreign to Scotland, while we know it was of high distinction in England, and numbered among its members the Hollands, Dukes of Exeter, and Surry, &c.

in Ternway sal be keparis of yat house, mony or few, as likis to ye saide lady, unto ye tym of ye fulfilling of ye said meryage lauchfully, quhilk being done be dispensation, ye said Castell salbe deliverit frely to ye said george and his said spouse"—also the said lady and " hir men sall do all yare gudly power to gar ye said lord Earle of huntlee have deliverance of Louchindorbe." —James the son and heir of the Countess, being " resavit be his lady moder salbe in keping wyt *hir*, or wyt *hir oune* quhar scho best likis till his lauchful age *wytouten bodely harme till his life*,".—further the earl and his son shall not " *constrain* ye said lady countass of Murra to mak resignation, or alienation of ye erldome of Murra wyt ye pertinentis *fra hir ayris gottin*, bot at hir awin fre will, in ye quhilk erldome ye said lord, hir spouse, and aperand ayre sall defend ye said lady countass of Murra at yare gudly power, and mak hir sicker at his power of oure soverane lord ye king to be undistroblet in ye possessione of hir earldome." [1] There is also a guarantee, in favor of the disponees, of grants made them by the deceased Archibald Earl of Murray, the former husband of the countess, who, it is well known, being implicated in the rebellion of his kinsmen the Douglasses, had fallen in battle in the same year.

This was a very natural proceeding on the part of the Huntly family, who were always eager to possess themselves of the earldom of Murray. The Christian name of the countess, her second marriage, and that she had a daughter Janet, as well as a son James, as instructed by the same deed, are all unknown to genealogists. It can be proved that the countess, who was not allowed to retain the earldom—which may have been one reason for her divorce—afterwards married Colquhon of Luss, and was grand-mother of Malcom Colquhon alive in 1494. As he figures then as her heir, claiming certain lands in her right, her two children, James and Janet Douglas, involved in the common fate of their relatives the Douglasses, may have come to a premature end. Mary, sister of the Princess Annabella, is said to

[1] Gordon Charter Chest.

have married "the Count of Bouquhan, son of the Lord of Campvere," an alliance although not princely, yet beneficial to the Scots. The title was not Bouquhan but "*Buchan,*" the earldom of which in Scotland is stated to have been granted to him. The family name of the count or earl was Borsell, and they were allied to the Bourbons. See Anselme, Vol. I. p. 314. They were also counts of Grandpré in France, ibid. Richard II. of England grants in 1385, "Henrico Borsell domino de *Canfer* (*Campvere*) quem penes se retinuit, ducentas marcas pro vita e Scaccario."—Rot. Pat. p. 211.

Since writing the above, Thomas Thomson, Esq. Depute Clerk Register, &c., has pointed out to the author the following curious and original information, from a very recent performance,—the "Proceedings and Ordinances of the Privy Council of England," edited by that persevering antiquary, Sir Harris Nicolas, in 1834. Among the Minutes of Privy Council, in the month of February 1400, this appears as one "de certains matires necessairs a monstrer au grant conseil du Roy."—"*En primes* si Richard, nadgairs Roy, soit uncore vivant a ce que len suppose, quil est, ordenez soit quil soit bien et seurement gardez pur sauvacion de lestat du Roi, et de son roiaume." And afterwards at the same time, the Council came to this resolution upon the subject.—"Quant a le *primer article*, il semble au Conseil expedient de parler au Roi, quen cas que Richard, nadgairs Roy etc, soit uncore vivant, quil soit mys en seuretee aggreable a les Sieurs du roiaume; *et sil soit alez de vie a trespassement qadonqes soit il monstrez overtement au peuple au fin quils ent puissent avoir conissance.*"[1]

We are here presented with the first project of the plan of the exhibition of Richard's person, which did not originate from Henry IV., but was the sug-

[1] Vol. I. pages 107—11—12. The quotations are given without the contractions. The day of the month is not stated.

gestion—and a very natural one—of calm and intelligent third parties. Richard at that time was either not dead, or his death, which is said to have happened on the 14th February, not fully divulged owing to its recent occurrence; while Henry eventually profited by the advice tendered him as the best that could be adopted, without any desire, so far, as can be discovered, of availing himself of an undue pretext in order to deceive the people.

The earliest entry respecting the pseudo-Richard (in 1407) in the Scottish Exchequer Rolls, is remarkable. Albany, it is stated, advanced himself the pittance for the support and custody of the latter, "*quia* non fuit inde de redditibus regis, ad *expensas hujusmodi* persolvendas,"[1] in other words, the matter being a very inferior concern, the government had not money to throw away upon quirks of such a kind. It is but justice to the learned gentleman who has been mentioned, to add, that he was the first who showed the author the valuable record last referred to, as well as the entries there regarding the impostor, at the distant period formerly stated.

The author may here correct a casual error at p. 41, he said there was no rumor of the existence of Richard, except what originated from the imposture of *Maudelain*, immediately after the death of the latter; it should have been *after* the death of *Richard*.

[1] Vol. II. p. 18.

# OBSERVATIONS

UPON THE REPRESENTATION OF THE

## RUSKY AND LENNOX FAMILIES,

AND OTHER POINTS IN

## MR. NAPIER'S MEMOIRS OF MERCHISTON.

# OBSERVATIONS, &c.

MANY years ago the Author, in a refutation that he published of the claim of the Lennoxes of Woodhead to the male representation and honours of the *original* Earls of Lennox (*of the surname of Lennox*), observed, that " The ancient family of Haldane of Gleneagles, and the noble one of Napier of Merchiston, have always been held, until very modern times, to be the co-heirs of Margaret de Levenax, wife of Monteith of Rusky, who, there is every reason to believe, was the eldest daughter of Duncan, Earl of Lennox, who left existing issue. This at least appears to be the fact, whatever doubt there may be as to which of the former was her nearest[1] representative, owing to the deficiency of explicit legal evidence."[2]

It will be perceived, that it is not decidedly affirmed which of the two co-heirs alluded to was the

[1] *Eldest.*

[2] See Reply to the Mis-statements of Dr. Hamilton of Bardowie. Appendix No. I., published Edinburgh 1828.

eldest; on the contrary, there is a direct admission that the point might be susceptible of doubt "owing to the deficiency of explicit legal evidence." At the same time the author must admit, that not only then, but long afterwards, he had inclined to the idea that the eldest co-heirship was vested in the family of Merchiston; and that with whatever niceties the case might be attended, the presumptions seemed to preponderate upon their side. Like many points of antiquity, it might only be ruled by presumptive evidence, but still that evidence appeared to be in their favor.

The grounds upon which such opinion was founded, will be immediately stated, but before proceeding to them, it may be proper to recur to the genealogy of the house of Lennox, at the period connected with the question at issue.

Duncan Earl of Lennox, who died in the reign of James I., had no lawful male issue, but he was the father of three daughters—Isabel, Margaret, and Elizabeth. Of the seniority of Isabel, who was married to Murdack, Duke of Albany, there can be no doubt;—whether Margaret or Elizabeth[1] was the next in order, has been affected to be doubted; but upon a due balancing of all the circumstances and authorities, it may be really held

[1] Elizabeth married Sir John Stuart of Darnley, and of them the noble and eventually, *Royal* House of Darnley, and Lennox are descended.

that Margaret was the second daughter. The line of Isabel, Duchess of Lennox, failed in the reign of James II., so that, admitting Margaret to be the second daughter of the above-mentioned Duncan Earl of Lennox, her descendants came necessarily in her right to be the eldest representatives, and co-heirs of that nobleman.

Margaret married Robert Menteith of Rusky, and had issue by him. Their lineal heir and representative, Patrick Menteith of Rusky, died previously to 1456 without issue, when his two sisters, Agnes and Elizabeth, as his heirs portioners, stepped into the rights and *status* of heirs of line of the family of Rusky, and obviously in the same character, to the representation of the house of Lennox. Agnes married Sir John Halden of Gleneagles, and Elizabeth John Napier of Merchiston. These parties, as may be already evident, were the direct progenitors of the families of Gleneagles and Merchiston, whose respective claims to the *eldest*, and preferable representation of Rusky, and necessarily from what has been stated, of the house of Lennox, forms the principal subject of the present discussion. It is a question merely of female seniority, and is generally supposed to bear equally upon the right to the earldom of Lennox.

After this genealogical sketch, we now come to the facts, and presumptions that have been conceived to argue the seniority of Elizabeth Menteith,

the ancestrix of Merchiston, over her sister Agnes, the ancestrix of Gleneagles.

The first authority that shall be noticed, is an entry in an original Exchequer roll relative to the relief-duty paid to the crown by these co-heiresses, upon their succession to the Rusky estate. William Murray of Gask, the Sheriff of Perthshire, debits himself between the 26th of July 1454, and the 1st of October 1456, with the former in the following terms:—" Et de xxxii$^{li}$ ii$^{s}$ i$^{d}$ de relevio medietatis terrarum de Thom, et lanarky,[1] ac de *Rousky* Regi debito per saisinam datam *Elizabethe de Menteth* de eisdem. Et de xxxii$^{li}$ ii$^{s}$ i$^{d}$ de relevio *alterius* medietatis *dictarum terrarum* Regi debito per saisinam datam *Agneti de Menteth sorori dicte Elizabethe* de eisdem." These are the precise words of the original, and it might thence follow, that Elizabeth was the eldest sister, as she is mentioned before Agnes. It would seem natural to mention the eldest co-heir first, not only in conformity to usual practice, but because she, as the *dignior persona*, had certain preferences in law, and would fall first to be seized in the property.

In the next place, it is proved by royal charter, dated 21st of May 1509, that Archibald Napier of Merchiston, the son and heir of the Elizabeth Men-

[1] Thom, and Lanarky, or *Lanrick* (*now oddly christened Clan-Gregor Castle*), were subordinate parts of the Rusky estate.

teith, possessed " dimidietatem terrarum de Rusky, *cum messuagio*,"[1] while by another, dated the 20th of January 1508, John Halden of Gleneagles, the grandson and heir of her sister Agnes, is instructed to have had the other half of Rusky " cum manerio," but without any mention of a messuage.[2] The term " messuage" being with us descriptive of a house, and employed to designate the principal mansion on an estate,[3] it would accordingly follow, especially under the circumstances, that the Napiers of Merchiston actually possessed the principal messuage of Rusky; which is obviously a fact of importance, because it is well known that, both by ancient and modern practice, the latter, in the case of the succession of co-heirs, always devolved to the eldest. Archibald, the son and heir of Elizabeth Menteith therefore, being possessed of the half of Rusky *cum messuagio*, as far back as 1509, to the exclusion, as would seem, of the heir of Agnes Menteith, we might thence conclude that Elizabeth was her senior, and the principal representative of Rusky. It is further to be observed, that although anciently the eldest co-heir had an un-

[1] Reg. Mag. Sig. Lib. 15, No. 137.

[2] Ibid. No. 79.

[3] " *Messuagium*—ane principal dwelling-place, or house within a barronie." Skene, Glossar. *sub hac voce*. Spelman renders it, " honestum quodvis domicilium sine prædio," and affirms that " Messuagium" differs from " *Massa* (*a portion of land*) ut pars a toto, *situs* Manerii a manerio." See his Glossary.

doubted right to the chief messuage, yet the notion was entertained that she should make some compensation for it to the younger co-heir,[1] and in this way the property of the *manerium*, which with us only meant the land contiguous to the mansion-house, and had not the extensive signification as in England, may have devolved upon Agnes. The chief residence or fortalice, owing to its being an important stronghold, might, in barbarous and feudal times, have possessed a value and consideration not familiar to modern apprehension, and that of Rusky, as will be afterwards seen, from its insular situation, was peculiarly inaccessible and impregnable. The value of it, therefore, may have risen in proportion, and been thought commensurate with the neighbouring or demesne land, which in this instance would necessarily be situated upon the banks of a lake.

It may be doubted, after all, whether this part of our law, like other points, even of the simplest kind, was fully settled at the time, for it is observable, that by a charter to Sir Alexander Napier of Merchiston, (the son and heir of the previous Archibald) dated the 21st of June, 1512, he has not only the half of Rusky "*cum messuagio*," but also the *Manor*.[2] Such apparent possession too is the more striking, because it cannot be shewn to have been in consequence of any arrangement between the co-

[1] See Reg. Mag. Sig. Lib. ii. c. 27, § 4; c. 28, § 3; "ita quod in *aliis* rebus *satisfaciat*."

[2] Reg. Mag. Sig. Lib. xvi. No. 66.

heirs—indeed, the actual reverse will be fully evinced in the sequel. This, however, might be explained by the observation of Skene, that the "principal *maines (manerium) suld not be divided*, but should remain with (a man's) aire, and successoure *without divisioune*, together with the principal messuage. And full satisfaction should be made to his wife or relict, therefore furth of the second mainnes, or utherwise."[1] The same doctrine by analogy, might apply to the eldest heir portioner, if it be grounded upon the notion, which seems to hold in reference to the messuage, that the representation and dignity of the family are better supported by possession of the latter. But be this as it may, the remarkable fact unquestionably is, that the Napiers of Merchiston, judging from the above authorities, had, in these respects, a decisive preference to Gleneagles, which seemingly can only be explained by the circumstance of their seniority, as in every event, whatever may otherwise have held, the principal messuage always went to the eldest co-portioner. This even happened in those cases where the younger co-heirs were by no means overlooked. One instance of the kind may be here appealed to, which, besides, will curiously exemplify what seems to have been the law and practice in 1564, in the succession of co-heirs.

William Cairns of Orchardton, died shortly before the penult of March, in that year, leaving three heirs-

[1] Glossar. voce *Manerium*.

portioners, Margaret, Janet, and Janet Kennedy, the only child of a third daughter of the name of Elizabeth, who had pre-deceased; and of the above date, a decree and rolment of Court, with a brief of division, &c., was given by the Stewart of Kircudbright and his deputies, upon the deliverance of an inquest, to the following effect:—" Yat ye said *Mergreit* Carnis ..... of ye saidis thre heretable portioneris sall have *ye principall best chymmis* of the hail foirnamit nyne merk landis of Orchertoun wyt ye pertinentis, the said Jenett Carnis *secounde* portioner sall have ye *nixt* best chymmis of ye saidis IX merkis landis and ye said Janet Kennedy and hir tutoris, &c., hir choise of ye *remanent* chymmisses or Mansses, *gef ony be;* alsua that ye *said eldest* portioner sall have ye first ryge begynnand at ye sone,[1] the said Janet Carnis, secund portioner, ye nixt ryge, and ye third rige,[2] and sua furt rynning[3] rige of all and haill ye fornamit IX merkis landis of Orchardtoune, above specifiit safer as is proportit yerof; and siclik yat ye eldast portioner sall have the first cupil,[4] and ye secund portioner ye nixt cupill, and youngest portioner ye third cupill of housses, and sua furt ilkane yer cupill, in ordour efter uyer, begynand at ye eldest portioner to ye youngest wyt returning als aft as neid bees; siclik

[1] Sun.

[2] Something is here wanting to complete the sense, but it is sufficiently obvious.

[3] Running.

[4] Rafter.

that all modois[1] and mosses of ye foirnamit landis of Orchardtoun be dewydat be mett and messoure, rude,[2] and rape,[3] and ye eldest portioner sall have ye first messoure at ye sone, and ye remanent portioneris to follow in ordour, and to returne als aft as neid beis, after ye quantitie of ground; and for dewyden of commonteis of ye said nyne merk land, sa fer as is propirte yerof, yat ilkane of ye said thre portioneris sall have elik[4] sowmes of guddes, lik pasture and lik wynnyng of fewall yairupon providing yat yai exceid not in ye haill, outang them all thre, ye ressonabill beirth of ground;[5] and yat all woddis of ye propirte of ye said nyne merk land, be dewidit be rude, and raip, met, and mesoure, siclik as ye moss and medois or be aikeris, half aikeris, ruidis, or half ruidis, and sua furt efter ye quantitie of ye grund, and ye eldast portioner to have ye first particat and mesour at ye sone, and ye remanent twa to fallow in ordoure, as is above specifeit; and yat ilk of ye saidis three portioneris sall haif ye thrid pert of all fischeingis, hunting, halking, and fouling wytin be boundis of the foirsaidis landis, and ye eldast portioner sall evir[6] ye first place, and ye remanent twa to follow successive, as said is."[7]

[1] Meadows. [2] Staff. [3] Rope. [4] Like.

[5] That is, all having a reasonable charge upon, or interest in the subject.

[6] Something is here wanting, but the sense is clear from the context.

[7] Register of Acts and Decreets of Council and Session, vol.

It would follow from this precedent, that the eldest heir-portioner had the first choice in the case of most of the above subjects. In others her interest was exactly identical with the younger co-heirs; but while this obtained, she was legally entitled to the principal Messuage, and it seems to have been further thought, that if there were only two mansion houses, these were exclusively to go to the first and second co-heir, without recompense to the youngest. It is here, therefore, that we find any thing corresponding to our notion of a *præcipuum*, which probably would have held also in favor of the eldest heir-portioner, supposing there had only been one mansion or chymmis.

The present argument is obviously in unison with the previous one, drawn from the entry in the Exchequer roll, and they may both mutually assist and corroborate each other. The evidence that has been stated is so much the more important, because by our old practice, the principle of co-heirs, succeeding equally, held nearly in every respect, with but few exceptions. All co-heiresses were alike styled "the ladies," and "owners" of the joint property which they inherited,—their respective seniority is hardly ever stated, and in describing them, the

30, p. 26, b. The rollment of the Stewart was reduced in the Court of Session, by a decree in absence, in 1564, but it is conceived, upon an error in fact, and not compromising the law laid down. As may be seen in the Appendix the legitimacy of Janet Kennedy, one of the co-heirs, was then legally questioned.

phrases "una hæredum," and "altera hæredum" are indifferently employed. Female co-heirs also bear the same arms; and owing to these singular concurrences, it is often extremely difficult to determine which may be the eldest. It is only by the descent of the mansion-house, chief superiority, or first presentation to a living, and by means of collateral circumstances, that the fact can ordinarily be illustrated. No other discovery having formerly been made to defeat the previous inference, there accordingly arose a fair argument in favor of the seniority of Elizabeth Menteith over her sister Agnes. But, at the same time, presumptive evidence only was supplied—there was not *probatio probata*, and it was still possible that the conclusion might be redargued by supervening authorities of a more decisive character. Some additional inferences, perhaps to the same purport, might be strained from other incidents, but these are too indefinite to be much, if at all, relied upon.

The above view of things (with the relative evidence) the author communicated, at a distant period, to the late Lord Napier, and a few years ago to Mr. Mark Napier, advocate, at his request. He regrets to find that the learned gentleman, in his Memoirs of Merchiston, which he did not see until published, while he represents Elizabeth Menteith, the Merchiston ancestrix, as the eldest co-heir of Rusky, instead of standing upon probabilities and presumptions, gives the fact as an absolute certainty; from

which he concludes, that the earldom of Lennox is indisputably in her line.[1] It happens, singularly enough, that the author has latterly stumbled upon an unexpected piece of evidence, which presents itself in strong contrast to these propositions, and although it be at variance with his former inferences, he yet rejoices in the discovery, because it may correct error, and render justice to a family, whose preferable claim, it is very obvious, has actually been disputed.

The evidence alluded to is of a retrospective kind, and occurs at a period that could not have been looked for. The family of Haldane had evidently been prosecuting a suit against that of Napier in reference to their interest in the estate of Rusky, and the following incidental procedure appears in the record of the supreme civil court on the 29th of July in the year 1562.

" Transferris wyt consent of ye pertiis procuratoris underwrittin ane contract allegit maid in presens of ye lordis of consale for ye tyme betuix umquhile Jhone halden of glenegas for himself, and umquhile James halden his sone and apperand air for ye tyme on yat a e pert, and umquhile Jhone naper of Merchamiston and elizabethe his spous on yat uyir pert, anent ye devision, depertesing, and deling of ye landis of Ruskie and lanerk wyt ye pertinentis betuix ye foirsaidis pertiis in yis maner,

[1] Memoirs, Pp. 525—6—7. Append. Note A, &c.

that is to say yat ye said umquhile Jhone halden consentit, grantit, and admittit yat ye said Jhone naper suld depert, devis, and deill ye foirsaidis landis in yis wise, in ye first yat ye said umquhile Jhone halden, and James his sone *as* ELDEST portioneris suld tak for yer *first chimmeis*[1] of *Rusky* ye place wytin ye loche of Rusky, and for ye place of ye landis of lanerik ye place and biggingis of lanerk, and yat ye said umquhile Johne naper and Elizabet his spous to cheise uyir tua chimmeisse quheir it plesit yame wytin ye samin landis, and to tak ye bordland of Rusky for yer chimmeis gif yai pleise, and foryer suld devoid ye forsaidis landis in tua evinlie pertis as yai best ma be depertit and devidit, as ye said contract allegit, insert, and registrat in ye bukis of umquhile our soverane ladeis grandschiris consale, to have, and havand ye strenthe of ane decreit of ye lordis yerof for ye tyme of ye dait ye secund day of August, the yeir of go J^m four hundred lxxxv yeris, at moir lenthe proportis, in Jhone haldane of glennegas, successor to ye saide umquhile Jhone halden of glennegas and heretabill possessor of yat ane half of ye forsaidis landis wyt ye pertinentis *active*, and in Archibald naper of Merchamstoune as air at ye leist successor to umquhile Jhone naper of Merchamstone and portioner and heretabell possessor of ye uyer half yer of *passive*, and decernis and ordainis siclike

[1] It need hardly be mentioned, that "chimmeis" or "chimmis," means a dwelling-house.

lettres to be direct at ye instance of ye said Jhone halden against ye said Archibald naper of Merchamiston for compelling of him to fulfil the forsaid contract and decreet in all points efter the tenor of ye samyn as myt or suld heife bene direct at ye instance of ye said umquhile Jhone halden agains ye said umquhile Jhone naper of Merchamstone for compelling of him to fulfill ye foirsaid contract and decreit efter ye forme and tenor yerof schewin and producit before ye saidis lordis. The said Jhone halden of glennegas compeirand be maister Alexander Mauchane his procurator, and ye said Archibald naper of Merchamston compeirand be master Jhone abircrumby his procurator, and yat lettres be direct to ye effect forsaide in forme as effeirs."[1]

There is a previous entry in the record relative to the same transaction, but it is imperfect, as will be evident from the excerpt, of a corresponding date, that is subjoined.

" Transferris ye contract and appunctment and decreit of ye lordis of counsell interponit yairto for ye tyme berand and contenand, as fallowis. At Edinburghe, ye secund day of August ye yer of god four hundreth four scoir and five yeris, in presens of ye lordis of counsale underwrittin, that is to say, ane maist Reverend fader, and Reverend faderis in

[1] Register of Acts and Decreets of Council and Session, Vol. xxiv. p. 466. On the margin are these words, " Glenegas contra Lerd Merchamston."

god, Williame, bishope of Sanctandrois, Robert, bishope of glasgow, Williame, bishop of abirdene, nobill and mychtie lordis, colyne, erle of ergile, Chencellor of Scotland, david, erle of Craufurd, &c. &c.—it is apunctit and finale endit betuix Jhone halden, of glennegas, for himself, and James halden, his sone, and apperand air on yat ane part, and Jhone naper and elezabeth his spous on ye uyer pert, anent ye devisioun, depertesing, and deling of ye landis of Ruske and lanerk, &c. in maner ande forme as efter followis, that is to say, ye said Jhone halden consentis, grantis, and admittis yat ye saidis Johne naper sall depert, devoid, and deile ye saidis landis above writtin yis wise. In ye first, that ye said Jhone halden, and James his sone, as *eldast* portioneris sall tak for yer first chimmeis of Ruske, ye place wytin ye loche of Ruske, and for ye place of ye landis of lanerk, ye place, and".....Here the entry suddenly terminates, but we are thus presented with part of the original contract in 1485.

After due examination, nothing further has transpired, nor in any register, or quarter whatever, has more been detected of the latter document.

Every one versant in the common forms of law will perceive that this is an action of transference at the instance of John Haldane of Gleneagles, in order to connect in his person the right that had been vested in his ancestor, in terms of the contract in 1485, and thus enable him to prosecute any claim or interest that might thence arise. It is

also with consent of the parties,—that is to say, of Archibald Napier of Merchiston, as well as of the former, and, as far as can be inferred, the question affecting them would seem exclusively to turn upon the import of the conditions of the contract, without reference to the fact involved in the words "eldest portionaris," applied to the Haldanes, which in a manner may be acquiesced in by Napier. If we hold this to be the case, the latter expressions would at once settle the point. But still it is very remarkable, that not only after the date of the contract, as has been proved, but even of this litigation in 1562, the Napiers appear to have held the *Mansion (or Messuagium)* of Rusky, together with the "Manerii *loco.*" Thus, a Crown charter upon record, dated the 8th of October 1572, confirms to John Napier, the inventor of logarithms, in fee, under reservation of his father's liferent, the half of Rusky, "*cum mansione, manerii loco,* dimidietate lacus," &c. It must likewise be confessed, that much error and misrepresentation, often obtained in similar cases at the period; and it is indisputable, that John Lord Darnley, who was sprung from the youngest daughter, and co-heir of Duncan Earl of Lennox, in the course of his unjustifiable acts in the fifteenth century, actually asserted, that she was the eldest daughter, by pretext of which he was served eldest co-heir of the same earl by a retour, which was revoked by the King.

The seeming possession of the *Messuagium* or

*Mansion* by the Napiers in 1512, and 1572, while the Haldanes, previous to the last date, claimed the principal chemise or messuage, if not actually entitled to it, is a kind of puzzle that is perplexing; and there is besides the postponement of Agnes, the ancestrix of the Haldanes, to her sister, Elizabeth of Merchiston, in the Exchequer rolls,—which, although not conclusive, is an extraordinary incident.

Whatever may be inferred from collateral circumstances, no evidence previously was known of so precise a character as that now adduced, or applying the term "*eldest*" to either of the Rusky co-heirs. If admitted to be unexceptionable, the consequences may be great in reference to the claim to the earldom of Lennox. It must on all hands be held, that there is no bar from prescription, or forfeiture;[1] and that the earldom,—like that of Sutherland, which is even more modern,—*should* have gone to the eldest heir-general. So far the claim of the latter would appear to be good,—but there is another circumstance deserving consideration, which has not been attended to in the controversies that have arisen upon the subject. The house of Darnley, although descended from Elizabeth, the third

[1] All the Lennox co-heirs were served to Duncan Earl of Lennox, "qui obiit ultimo vestitus et saisitus ut de feodo (in the Earldom of Lennox,) *ad fidem et pacem* domini nostri Regis," &c. This is proved by their existing retours to portions of the fief.

and youngest daughter of Duncan Earl of Lennox, yet acquired by onerous transactions with both the Rusky co-heirs, the superiority of the entire fief of Lennox towards the end of the fifteenth century, and hence, it may be argued, that whatever their situation previously was, they thereby became Earls of Lennox by a singular title. It need hardly be remarked that, in feudal times, the heir who had the principal superiority, and messuage, which was identified with it, both of which subjects in the present instance, were afterwards possessed by the Darnleys, was regarded as having equal right to the corresponding honor and dignity. The House of Lords, who are extremely hostile to the territorial principle which would here come into play, might be disinclined to admit its operation at so late a period, comparatively speaking, as the above; and beyond doubt, if they followed the authority of Lord Mansfield and other great lawyers. There may, however, still be something in the objection, and whatever the modern impression is, it certainly cannot be overlooked. There may possibly have been a *new* constitution of the dignity in the Stewarts of Darnley, although not yet discovered, which the House of Lords might presume under the circumstances of the case; but even admitting the fact, it might not compromise the descent of the *ancient* Earldom. James VI., as is well known, was the male representative, through his father, of John Lord Darnley, the first Earl of his line.

The last male descendant of his branch, was the Cardinal of York; and their direct representation, now identified with the white rose of England, has devolved, through the Kings of Sardinia, upon the Archducal and Princely House of Modena. It is singular that the white and red roses of England came to be respectively blended in two Italian princely families—namely, in the former, and in the Farneses, Dukes of Parma, as was shewn in the preceding article.[1]

However agreeable it may be to render justice in this manner to the heir-general of the House of Gleneagles, the Author cannot but feel regret at the disappointment which the Napiers, and possibly their biographer, may experience, owing to the above discovery. The family of Merchiston, however, may sustain but a slight deprivation, for independently of being the undoubted representatives of a Lennox and Menteith co-heir, they possess other claims to our attention, that must ever make them conspicuous and distinguished. In particular, the inventor of logarithms would illustrate any race; and it is pleasing to observe the ardent efforts of his biographer to do full justice to his genius and memory. Mr. Napier, in a pardonable enthusiasm, and admiration of the hero of his performance, maintains that he was the greatest man whom Scotland ever produced, and that Sir Walter Scott,—who has ex-

[1] See p. 20, *note*.

tended its fame to the farthest corners of the globe —was only second to him.[1] Such being the case, Buchanan "Romani Eloquii Princeps," &c. must necessarily sink two degrees in the scale of intellectual excellence, and content himself with a humble post in the rear of these personages. Indeed Mr. Napier contends, that Buchanan was confessedly inferior to Napier, and seems to think that the former has been unworthily contrasted with him.[2] This is rather a nice and subtile subject. The difficulty lies in the test of comparison. The parties cannot be well brought into juxta-position with each other, or respectively estimated after the manner of Plutarch. There are few if any points of mutual approximation, and all we can say is, that both were unrivalled in their individual departments. It is easy to compare Homer, Virgil, and Milton together, but in this case the parallel fails, and we might as well attempt to compare Shakespeare with Archimedes, Dr. John Hunter with Byron, or Dr. Parr with Watt. When we think, however, on the genius, elegant, and classical accomplishments of Buchanan—so wonderful in his age—we can hardly be tempted to assign him a secondary rank to any one; and it is remarkable that, by the consentient voice of all Europe, the laurel has already been conceded to him. On the other hand, we might appeal to the authority of

[1] Mem. p. 327.

[2] Ib. p. 99—100.

Scaliger, "the *Dictator* of Letters," who affirms that —"*præclarum ingenium non potest esse magnus Mathematicus*"—which may apply to Napier with due force, for his pursuits were limited, and chiefly confined to the department which this great authority pointedly undervalues. Indeed, it is thought by some, that mathematics contract the mind, and unfit it for other pursuits.

There are but few traits of a private character preserved of Napier of Merchiston, a remark that may be extended to nearly all his co-temporaries, not forgetting Craig, to whom Mr. Napier has directed his attention.[1] In these circumstances, although certainly from an amiable motive, their respective biographers are, perhaps, rather apt to presume too much in their favor, and to array them in an ideal excellence, which is rarely indeed to be be met with at the period. The author may here repeat what he has asserted elsewhere, that the more the subject is probed, the more will the scale preponderate in respect to moral excellence, delicacy of sentiment, and rectitude, in favor of modern times. Notwithstanding their severe exterior, stern, and uncompromising religion, and *covenants* with their Maker, the heroes of the sixteenth century were not inattentive to their worldly interests; and however accomplished, and even elegant they may appear in their writings, they exhibit but a sorry picture when we withdraw

[1] Memoirs, p. 97.

the veil from their private lives. Although most incorrect in matters of fact, Craig certainly was a person of great literary merit and endowments, but he, as well as most of his legal brethren, may too truly illustrate the truth of these observations.

Previous to the sixth of February 1607, Alexander Hay of Dalgattie, instituted an action for adultery against his wife, Elizabeth Keith Lady Allardice, a woman, as can be proved, of a profligate character; "the falt being allegit committit be hir, and upone hir pert." In this emergency the lady having raised a counter action of the same nature against him, applied to her friend Sir John Lindsay of Benscho, a noted courtier and spendthrift, who went to Craig, and on condition of his assisting her, "promittit to him for his panes, and reward ane gude and sufficient haiknay naig, quhilk he promittit to have deliuerit (to him) wyt all diligence possible yerefter." In the hopes of such a munificent return, Craig, "according to the said paction and promeis, enterit as procurator for the said actionis," and "be his great diligence and travellis efter the pleading of the saidis cawsis be the space of tua yeris, *the lady Allerdes wes assolzeit*, and the *fault fund wyt the said Laird of Dalgatie*." The parties having now attained their end, as might fairly have been expected, thought no more either of Craig, or the nag, weighing them perhaps, in the same scale, and like generals in war, after availing themselves of an artifice, despising the tools they had employed.

In the meantime, our lawyer pursued Lindsay for fulfilment of his paction, impassionately stating, that he, "during the said space of tua yeiris receauit na uther profit, nor commoditie, bot the promeis of the said haiknay horse, and hes oft and diverse tymes requerit the saide Schir Johne to deliver it to him." He here prevailed; and it is from his own statement to the court that these particulars are derived.[1] The consistency of Craig upon the occasion, is the more remarkable, because previously, in 1599, as Procurator for the church, he had severely reflected upon the married pair as equally abandoned, and illegally seeking to free themselves from their engagement, that they might gratify their desires by means of new ties; — a conduct he denounced as "abill to infer innumerabile inconvenients, and to prophane and abrogate the holy institutione of marriage, and to bring the samin to ane far less accompt amang us christianes, nor amangis the very infidellis and paganis," &c.—"at whilk the court, na doubt, are *horrified*," &c.[2]

This extradinary step was in form of a complaint to the Court of Session, at the very instance of the Procurator, with concurrence of the Advocate; for Craig then thought it proper to bring the business before

[1] Act. Dom. Con. et Sess, vol. ccxxii. p. 425.

[2] Ibid. vol. clxxxv. Acts of adultery had been proved against Elizabeth Hay, the spouse, before the Commissaries—even with the lowest individuals—and yet, by Craig's address, the fault was at length found not to be with her, but with her husband.

them—at any rate it had his express sanction and approbation.—The above proceeding of this Lawyer is curious, as it shews that it was competent for advocates to sue for their *honorarium*.—It would hence appear, that Craig's conduct was not regulated by punctilious rules, and that even for a paltry consideration, he could lend himself to a questionable expedient (to say the least of it,) in defiance of principles of moralilty that he had before inculcated.[1] The maternal uncle of the inventor of Logarithms, Adam Bothwell, Bishop of Orkney, was unprincipled and worthless, at one time encouraging Mary in her baneful inclinations, at another proving her bitterest enemy—a presbyterian, and prelatist—an armed civilian, and affected devotee, while all along only constant to those measures that tended to advance his interests. He had a trusty confidant of the name of James Menzies, a cousin of the family, to whom he specially refers the Laird of Merchiston in 1559,[2] for the purpose of apprizing him of his difficulties, and perplexities at the time. Long afterwards, in 1589, John Bothwell, the son of the bishop, gives this account of a conversation between him and John Menzies, the identical son of the former, in the outer Tolbooth of Edinburgh, where the Court of Session

[1] For Remarks on Craig's inaccuracy as a legal writer, see the next Article.

[2] See original letter adduced by Mr. Napier, in the Memoirs of Merchiston, p. 63.

sat; and which gave rise to an action at his instance against Menzies.

"Being familiarlie fallin in purpose, and tak with his cuesing the saide Jhone Menzies, the said Jhone, within certane schort space therefter boastit out irreverently with ane lowd voice, calling the lordis of counsale men meit[1] to be briganis[2] betuix Rowane, and Parisse then to be Senatoris of the colege of Justice, the saide persewar[3] gentillie replyand agane to him saying yat it became him not to speik swa unreverentlie of the saidis lordis, he answerit ye said persewar agane, and *youre fader is als gret ane brigane as the rest*, ffor *he houndit out the laird of Merchamstone, his sisters sone to have slane his father*, unto the quhilk, alsua the saide persewar, alsae replyit, yat gif he had bene in ane uyer place he wald nocht have spokin sa raschelie, ffor gif he had done sua, the saide persewar wald have gewin ane uyer answer. Off that, the saide Jhone Menzies tuik occassione, and struck him with his fauldit neiff[4] upone ye briest, and *myndit*[5] to have laid the gardis of his sworde upon the saide perseuaris face, quha than seeing bayt importunitie, in speiking and doing, ffor eschewing of the strack of the gairdis of his said sworde, he tuik him backwart upone the cheik with his hand, quhilk he confesses, and yan upone the morne yerefter the said persew-

[1] The word, *more*, it is conceived is here omitted.
[2] *Brigands.*
[3] John the Bishop's son.
[4] Closed Fist.
[5] Intended.

aris fader being cuming up the hie gait, to the tolbuith for execution of his office, according to his accustumat manner,[1] to have presentit the said perseware befor the saidis lordis, to ye effect that tryell myt have bene tane yerintill, bot he in the meantyme accumpaneit with certaine uyer evil disposit persounes set upoun heis said fader, to have bereft him of his lyff, as is notour to ye saidis lordis."[2] "It is also added, that Menzies had talked ill of his father to the king. The Bishop had thus, if we are to believe the charge of the son of his friend and confidant—not to add relative, actively sought after John the inventor of logarithms his nephew, to induce him to murder his father. It is proved by another letter[3] adduced by Mr. Napier, that the Bishop's sister, the wife of Merchiston, complained to him of the estrangement of her husband's affections from her, and he has subsequently shewn that there was a disagreement between the elder and younger Merchiston relative to family affairs—the Bishop having been a party to settlements in favor of his nephew.[4] These seem to be the only motives discoverable for the asserted hostility of the Prelate to his brother-in-law. Be this as it may, Menzies, who from his situation must have known every thing, especially through his father, was merely put

[1] The Bishop was a Lord of Session.

[2] Act. Dom. Con. et Sess. vol. cxix. p. 85.

[3] Mem. p. 65. [4] Ib. p. 317, 318.

under arrest, and imprisoned, after which we hear no more of the matter. Both the Bishop and Sir John Bellenden, (a near relative of his and the Napiers), as Mr. Napier justly remarks, were two of the greatest hypocrites,[1] and while Sir John was involved in guilt and sedition, his will is full of grotesque cant, and aspirations after a sanctity that was foreign to him.[2] Ancient prejudices and habits are often embalmed among the vulgar; and this mixture of immorality with affected austerity and religion is still observable in the lower orders of Scotland—the worst trait perhaps in the national character.

Mr. Napier makes an irrelevant attack upon the author in reference to a conceived relationship of Sir Thomas Craig the feudist, through his mother Catherine *Bellenden*, with the Bellendens of Auchinoull. The author had generally stated in a late treatise, that there was little doubt of Catherine being of these Bellendens, because Sir John Bellenden of Auchinoull, the Justice Clerk, in his will in 1576, styles Sir Thomas his "*cousin*;" while he appoints him, with other relatives, to be tutor to his children. In his attempt to refute this natural, and, as is conceived, in the circumstances, self-evident proposition, Mr. Napier assumes that this Catherine, (through whom Sir Thomas alone traces

[1] Memoirs, p. 112.—"Than whom two greater hypocrites never existed," he says.

[2] Dated 19 September 1576. Recorded in the Testamentary Register of Commissary Court, Edinburgh.

his connection with the Bellendens) if at all allied to them, *could only have been so, as aunt* of the Justice Clerk;[1] and upon this hypothesis, he seeks to disprove the idea of a lawful relationship, from incongruities that would follow,—especially as the latter had a lawful aunt of the same name, the grandmother of the celebrated Napier. One weighty objection, it seems, is, that the peerage writers, those *immaculate* oracles, mention no other Catherine Bellenden except the last.[2] Mr. Napier actually founds upon this circumstance, although he elsewhere is at pains to shew, that the same persons suppress all notice of *two married sisters* of the Justice Clerk.[3] But it surely requires little argument to refute the cavil in question. The Bellendens at the time were numerous, and consisted of various members,[4] independent of the immediate

[1] His words are, "Mr. Riddell was scarcely aware of the genealogical surprise involved *in this theory* (that *Craig's mother* was *allied to the Bellendens.)* If true, there would be no doubt who the lady was. She *must have been sister* of Sir Thomas Bellenden, and *aunt* to the Justice Clerk." Memoirs, p. 98.

[2] Ibid. [3] P. 68.

[4] James Bellenden of Broughton, son and heir of Lewis Bellenden of Auchinoul, also Justice Clerk, on the 27th of October 1596, summons Mr. Thomas Bellenden, Wardator of Kinnouquhar, Sir Patrick ballanden of avie, Mr. Adam bellenden, parsone of falkirk, and James ballenden of Laswade, as *nerest of kyne to ye saide* James *on his faderis syde;* and Alexander Lord Levinstone, &c. &c. nerest of kyne to ye saide James on his mother's syde. There is mention at the same time of James

line of Auchinoul (afterwards ennobled), with whom the previous authorities had alone concern; and it is very clear that Catherine Ballenden, the mother of Craig, might still have been related to them, in a more remote degree, although she may not have been the aunt of the legal dignitary. This indeed is indicated by the term "*cousin*," applied by him to her son; for every one knows the meaning of a "*Scots cousin*,"—that it had not the limited sense prescribed to it by Mr. Napier,—equivalent to the son of an aunt,—but was far more extensive, and comprehended distant connections. What is thus stated may at the same time redargue the charge of illegitimacy, brought by him against Craig's mother,[1]—from her being sister, as

Ballenden of Newtyld, as "*of his faderis kyne*." *Judicial procedure in the Sheriff Court of Linlithgow, Elphinstone Charter Chest.* Independently of them, there were other Bellendens, relatives of Auchinoul. This notice is important in a different view, as fixing the Bellendens of Leswade to have been of the same stock. The Leswades, as was proved by the author, in a former treatise, produced the great *Bellendenus*. James Ballenden of Newtild, the father of the celebrated collector, and poet George *Bannatyne* (the same as *Bellenden*) patron of the Bannatyne club, was thus also a male relative, it being usual on such occasions to summon only the male descendants. Much literary merit certainly was inherent in the family of Auchinoul. Sir Walter Scott, in his Memoirs of George Bannatyne, erroneously supposes George, on the authority of the late Lord Bannatyne, to have been of the Bannatynes of Kames, in Bute, a different race.

[1] "She (Craig's mother) may have been a *natural* sister of

he fancies, of a lady of lawful descent, of the *same Christian name* with herself, which evidently solely rests upon the hypothesis that has been exposed.

The learned gentleman also alludes to the author's refutation of Mr. Tytler's statement, that the feudist's father was Mr. William Craig of Craigfintray, and not Mr. Robert Craig the burgess—but while he shewed that Robert was the real parent, he admitted the probability of Robert being sprung from the Craigs of Craigston—however difficult it be to fix the precise descent, and was far indeed from affirming any thing to the prejudice of the Craigs of Riccarton.

With respect to the profession of burgess, which, together with that of the law in France and other countries, was contemned by the aristocracy, "*gentil-homme bourgeois*," and "*de la robe*," being sarcastic and disparaging epithets, it certainly, in Scotland, came to be exercised more frequently by younger sons of feudal families in the sixteenth century. It is singular that at that period advocates were often burgesses, and while the husband harangued in his *forum*, his help-mate in the truest sense displayed her eloquence in *foro poli*, while extolling her husband's articles like another Robbins, and contributing to the profits of the esta-

the other Catherine Bellenden, which would explain the expression in Sir John's Will." Memoirs, p. 98.

blishment by a readier sale of the goods in communion.

Mr. Napier has done well in distrusting the fabulous descent in the male line of the Napiers of Merchiston, from a doubtful Donald, son of an Earl of Lennox, with the legend of Donald's military exploit, in consequence of which he was said by the Sovereign to have " nae-peir"—that is no equal —thus originating, as was supposed, the surname of " Naepier." He at length adopts, as their immediate ancestor, Alexander Napier, burgess of Edinburgh, who, according to him, figured in 1432. This Alexander, the root and progenitor of Merchiston, as far as yet known, had no ancestral estate, but was *artifex fortunæ suæ;* he, at the same time, is proved to have been the father of another Alexander Napier, burgess of Edinburgh, who had then arrived at maturity. Mr. Napier supposes that the first Alexander died in 1454, but there is no proper evidence of the fact, and the date of his death, and of his son's succession, are hitherto uninstructed. The author has been so fortunate as to discover a still earlier notice of Alexander the father, which fixes that he discharged the grave duties of Provost of Edinburgh, and Dean of guild, as far back as 1403; so that it is not likely that he survived till 1454. This being the first glimpse of a race conspicuous at the time, and afterwards distinguished, the relative authority is given below.[1] In the year

[1] " Prima gilde capitalis (*curia*) post festum Beati Michaelis, tenta in pretorio burgi de Edinburgh, convocatis confratribus

No. 109. Register Office.

1438, there is an entry in an Exchequor roll to the effect that the comptroller did not debit himself with the rents " Terrarum de Merchamyston," because " impignorantur per modum venditionis Alexandro Napier, burgensi de Edinburgh litera reversionis." Whether this was the father or son may be still a matter of doubt, but the son at least acquired the remainder of Merchiston, and the subsequent descent of the family being pretty exactly stated elsewhere, need not be dilated upon.

It is not unlikely that the first Alexander was a younger son of some of the feudal stocks of Napier, the most ancient of whom was the family of Kilma-

gilde, et comparentibus, 3 octobris 1403, electi sunt officiarii Gilde prout sequitur.

*Prepositus Alexander Naper Decanus Gilde*, et custoditor operis ecclesiæ,

Symon de Schele Ballivus de leyt

Thomas Robertson Thesaurarius," &c.

Excerpts from MS. Town Records of Edinburgh, in the handwriting of the sixteenth century, Advocates' Library. They belonged to Alexander Guthrie, town-clerk in the reign of Queen Mary. Alexander's son was also Provost, so it may be said of them as of " *Morisonus pater, et filius,*" in a monument in the Grey-Friars church-yard—

" *Ambo vixerunt clari*
*Urbis honoribus aucti.*"

To a conveyance of the lands of Moneyzane by Sir Malcom Fleming of Bigar, in favor of Patrick his son, dated 1st of November 1395 (in the Cumbernauld charter-chest), one " Alexander Naper" is witness, but he obviously is not identified with the Alexander in the text.

hew. Mr Thomas Crawfurd, Professor of Mathematics in the College of Edinburgh, an antiquarian of some note, and who lived in the reign of Charles I., says that the family of Merchiston, before the time of their elevation to the Peerage, impaled the arms of Kilmahew with Lennox,[1] which, according to Nisbet and Mackenzie, they bore as descended from the Lennox co-heir. Sir David Lindsay also, in his blazoning of their arms, while he inserts the Lennox insignia, leaves two quarters vacant, evidently for the reception of others,[2] which rather tends to corroborate Crawfurd's account. Still, however, it is remarkable that Mr. Napier produces a seal of Alexander Napier, the Provost of Edinburgh in 1453, which exhibits nothing but the Lennox arms—the cross being ingrailed, which last fact is immaterial, for it was so occasionally carried by the principal representatives of Lennox. Owing to this circumstance, Mr. Napier infers a descent from the Earls of Lennox in the *male line*, in behalf of Merchiston—Alexander not being sprung from Elizabeth Menteith, the co-heir of Rusky and Lennox, who was only married to his son. If his surname had been Lennox, the argument would have been stronger, but the difficulty here arises, from Alex-

[1] MS. Advocates' Library, Jac. 5. 5. 5. It is a MS. well known, and is referred to by Mr. Nisbet. He was the author of a curious History of the College of Edinburgh, that has been published.

[2] Collections, Adv. Lib. A. 7. 2. p. 22.

ander being a Napier, and the Napiers, in general carrying different arms, and not tracing their lineage to Lennox. At the most, it is very evident the co-incidence is but an adminicle. This, at least, must be admitted, while attention is paid to Mr. Napier's remark, that Alexander having no lands in Dumbartonshire, he could not have carried these arms as a vassal of the House of Lennox, which, on the contrary supposition, might have happened. At the same time, even this conclusion must be received with limitation. In the Cumbernauld charter chest, there is a deed by one "*Willielmus Pertus*"—no very noble name it would seem—in 1439, who actually displays upon his seal the simple arms of Lennox; but the Pertuses, upon this account, although they might have done so with equal justice as Merchiston, have never claimed a male descent from the Earls of Lennox; and it must be further observed, that *Pertus* was of the county of Peebles, and like the two first Alexander Napiers, had no connection whatever with Dumbartonshire.

Nisbet[1] and Sir George Mackenzie,[2] as already hinted, account for the Napiers of Merchiston carrying the Lennox arms by the marriage of John Napier with Elizabeth Menteith, who, they think, disused his own arms on the occasion, and assumed those that accrued to her as a Lennox co-heir. This, of course, is redargued by the evidence of the seal—

[1] Vol. I. p. 139.

[2] Heraldry, p. 72.

holding it to be genuine;—had it not been for the latter, the thing would have been extremely natural, —for other instances can be shewn of the arms of a co-heiress having become the sole ones of the family into whom she intermarried. Mr. Napier asserts that, if John, (who certainly was entitled to whatever his wife could claim) had assumed arms in her right, he would have taken those of Menteith; and he twits Nisbet with ignorance of heraldry, for entertaining the notion alluded to. He says "It is difficult to understand how Nisbet, an able and enthusiastic herald, came to adopt a theory of arms so unscientific. The proposition is startling, that the eldest son of that Sir Alexander Napier, whose career, we shall find, was most distinguished, had so utterly discarded the shield of a dignified parentage, as to leave no trace of what Napier of Merchiston carried of old. To have done so in those high and palmy days of the Lyon of Scotland, in order to assume the armorial bearings of his wife, would, however lofty the Lady, have been 'parma non bene relicta.' It is also singular that Nisbet should not have at once perceived, that had her husband indulged in such caprice, the armorial bearings of Elizabeth Menteith would not by any means have given the Lennox cognizance alone."[1] But if the learned gentleman had looked round for a moment, —so far from there being any thing anomalous in

[1] Memoirs, p. 15, 16.

this,—he would have seen a striking instance in point, in the case of a family of the first distinction. The present Duchess-Countess of Sutherland,[1] although the heir-general of the ancient Earls of Sutherland, is *immediately* descended from Adam Gordon of Aboyne, *younger* son of George Earl of Huntly, who married their heiress, in consequence of which their titles and estates have devolved upon her; but neither her Grace, or her family bear a particle of the arms of *Gordon*—here quite in *pari*

[1] This noble lady has lately taken the above designation, but with submission, the preferable order may be *Countess* Duchess, &c. Thus we have in Spain the Count Duke of Olivarez, and the heiress of the house of Benevente, invested in all the honors of the "Grandezza," and holding innumerable titles, including duchies, was named Countess-Duchess of Benevente, and not Duchess-Countess, as is proved by dedications to her in which her style occupies several lines. This may hold *a fortiori* in the case of Sutherland, owing to the remarkable antiquity of the earldom. Mr. Beckford informs us, that he was introduced to the "court" of Benevente (*the previous lady*) by her daughter the Duchess of Ossuna, *whose* "throne was a faro-table," and adds, "The sovereign old Benevente is the most determined hag of her rout-giving, card-playing species in Europe, of the *highest rank*, the *highest consequence*, and the principal disposer by long habit and cortejo-ship of Florida Blanca's good graces." —*Sketches of Italy, Spain*, &c. *Vol. II.* Pp. 336—7. Although duchess by abundant right, and there be the same gradations of rank in Spain as in this country, she is usually merely styled Countess of Benevente. The present style of Earl of Warwick, (and not Brooke,) may obviously strengthen what is maintained, in so far as regards a deviation from the ordinary method observed in the adoption of titles.

*casu* with *Menteith*—but exclusively the simple arms of Sutherland. The reason is plain, it is far better to have a high and principal representation *alone*, than qualified by one of a subordinate kind, in right of a younger branch of another family, the introduction of which might derogate from the importance of the former. Of the *lesser* description, the representations of Gordon of Aboyne, and Menteith of Rusky undoubtedly were. The Menteiths of Rusky, whose descent requires illustration, could, at any rate, only be cadets of Menteith; and Elizabeth Menteith, was thus merely the co-heir of a younger branch, while many heirs-general of the direct and principal line existed. We may add a still more illustrious instance. A natural son of the chivalrous and noble house of Bearn and Foix, married, long ago, the heir of line of the royal family of Spain, and their direct representative, the Duke of Medina-Celi, the premier grandee of Spain, —through the *intervention of another noble stock*— exclusively bears her arms, without a vestige of those of the intermediate ancestry. The instance too of the house of York is in point, who relinquished the arms of the family of Mortimer—the connecting link between them and the Crown; while the Earls of Argyle, it may be observed, take only the galley, the arms of Lorn, instead of those of the *Stewarts* of Lorn, although it was by marrying their heiress that they came to represent Lorn. In

this case, as is well known, the Stewarts were a collateral branch of the name while Lorn was a principal and independent stock.

Mr. Napier seems only aware of the existence of his own family, and of the Napiers of Kilmahew and Wrighthouses, but independently of Napier of Aghelek, who swore fealty to Edward I.,[1] there was another stock of respectable antiquity and consideration,—the Napiers of Garleton in East Lothian. Robert the second, by a charter dated 7th of March 1377, confirmed a grant, by William Napier, of the lands of Garleton-noble in favor of William Earl of Douglas and Mar; and there is a charter previous to this, but without date, by William Napier, son and heir of "umquhile John Napier, laird of Garletoun-noble," of the same lands to William Napier. As Mr. Napier, after various researches, has been unable to connect the first Alexander Napier the burgess, with the Napiers of Kilmahew or Wrighthouses, the author would humbly suggest an examination of the above deeds, the originals of which are in the charter-chest of Lord Wemyss, the present possessor of Garleton.[2] There may be also others in the same repository bearing upon the point. It is *possible* that he may be more successful in this quarter; and, at any rate, the seals of the Garletons, if preserved, might illustrate the armo-

[1] See the Ragman Roll.

[2] He only discovered their existence there through an inventory.

rial question. It is singular, that according to the traditional account among the Merchistons—although too fabulous upon the whole to be relied upon—their supposed ancestor Donald, the "*Næ-peir*" obtained, as a recompense for his gallant exploits, a grant of the lands of Gosford.[1] The latter, as is well known, are possessed by the above nobleman, and singularly enough happen to be in the vicinity of Garletoun.

"*Although* the Napiers be a very ancient family," says Crawford, "*yet*, I have *not found* any of them upon record before the time of the competition between the Bruce and Baliol for the crown."[2] Our genealogists are rather odd logicians; this is akin to a remark, that prefaces elsewhere the Campbell pedigree. "Of the antiquity of this noble house—the *best* proof is the *difficulty* that occurs in ascertaining its origin."[3] Hence, because a house is only traced, for the first time, at a comparatively recent period, it is to be regarded as "very ancient," and the greater difficulty and obscurity that attends its origin, the more ancient and illustrious it must be. According to ordinary impressions, we are not tempted to think highly of a family in these respects, because it is of obscure origin. But whatever may be the

[1] Memoirs, p. 8. [2] Peerage, p. 362.

[3] Wood, vol. i. p. 84. This remark, it is believed, is not Mr. Wood's, but comes from another quarter.

antiquity of the Napiers, it is unquestionable that the surname appears much earlier in England than in Scotland. The late Lord Napier, an acute investigator into the history and connections of the Napiers, very accurately states, that "*Johannes le Naper*," is proved by the Calendarium Rotulorum, et Inquisitionum ad quod damnum, to be "*venator regis*," and to have had eighteen acres in Essex, as far back as 1259. He, probably, was as peerless in his way, and as good "a knapper," or "nabber" (to use a Scottish term,) of game, as Donald the "Naepier," was of men. Very possibly, "Napier," or rather "*Naper*," which is according to the old orthography in both countries, is a personal surname, not taken from land, but from the feats of an individual. There is, however, a much older notice of the name in the *Testa de Nevil*, and spelt exactly as in modern times. "*Menigarus le Napier*," in the reign of Henry the Second, sometime between 1154, to 1189,[2] was appointed to the office, "*de Naperie*" by that Prince —that is provider, and superintender of the royal napery, or linen. The authority obviously suggests another derivation of the name—not from the valour of Donald, or the sportsman accomplishments of "Johannes le Venator," but from the more useful and royal occupation that is here mentioned.

We might thence infer, owing to the antiquity of the

[1] Wood, vol. II. p. 281.

[2] *Testa* de Nevil, p. 270, b. [3] Ibid.

one over the other, that if there be any connection between the English and Scottish Napiers; the latter derive their origin from the first, which would further refute the notion of a Lennox descent. Mr. Napier, however, unhesitatingly affirms that the Napiers of England are cadets of Merchiston, and significantly adds, in reference to them, "for English and Irish Napiers *cadets* of Merchiston, see Collins Peerage *passim*,"[1] with the natural view of shewing, that the blood of Merchiston, in this manner, circulates among all our nobility. But it unfortunately happens that there is no evidence upon record to instruct the fact. The complimental recognition, or attestation by the first Lord Napier in 1625, in favor of the English Napiers—those of Luton-hoo, &c. &c., as branches of his house—of which the copies are discrepant, and there can be little doubt garbled, cannot be relied upon. Every one, besides, is aware of the value of such testimonies, especially in Scotland. But let us see how the previous Lord Napier, who drew up an account of his family, and to whose genealogical labours Mr. Napier owns himself indebted, regarded the matter. His Lordship had the best sources of information—even more so perhaps than the first Lord, and concentrated in himself all that the family, his charter chest, and the most patient investigations could possibly contribute upon the subject. He makes Alexander Napier

[1] Mem. Append. Note A.

of Ingliston the lawful ancestor of the former.[1] This statement is so far satisfactory, that there can be no doubt of the Alexander in question being the eldest son of Archibald Napier of Merchiston, (son and heir of John Napier of Merchiston and Rusky) by Margaret Campbell, his last wife, and younger brother of "Sir *Alexander*" of Merchiston, who continued the line of the family. It is also consistent with a recognition, or testimony by the first Lord Napier in 1625, different from the one quoted, which affirms that "Alexander, *called Sandy*," younger brother of "Sir Alexander" of Merchiston, and *grandson* of John Napier of Merchiston and "*Rosko*" *(Rusky)*—evidently the above John—was ancestor of the Napiers in England.[2] It further adds,

[1] See genealogy of his family, ap. Wood, Vol. ii. p. 287. Mr. Napier informs us, that he "compiled with great pains and accuracy a digest of his charters and private papers, composing a genealogical account of his family, which remains in manuscript. This his Lordship communicated to Mr. Wood, and the substance of it will be found in the account of the family of Napier, contained in that gentleman's edition of Douglasses' Peerage."—Preface to Memoirs, p. 7.

[2] This paper, in the private charter-chest of a family descended from the Napiers of Merchiston, is entitled "*Another* testimony of the pedigree of the Napiers of England, given by the same *Sir Archibald Napier* of Merchiston," *(the first Lord.)* It has at the conclusion these words,—"*vanus nisi verus*," as if in ridicule of the thing, and reflecting upon a certain merchant, to be afterwards noticed. The date is 1st of June 1625. The other and previous attestation, as well known, is also in the same year.

that, having spent the greatest part of his youth in foreign parts, he came to England, and *settled at Exeter*, and was the father of Sir Robert Napier of Luton-hoo, and Richard Napier of Lingford, now living," &c.

But, so far for there being any foundation for these assertions, nothing can be more certain than that this Alexander, with whose history and fate such strange liberties have been taken, and who is also said to have married (although unconsciously to himself) Ann, daughter of Edward Birchley, Esq. of Hertfordshire, &c. &c., quietly terminated his career in Scotland, where, like his ancestors, he was an honest burgess, and possessed a small property, leaving his real wife, Isabel Litill, to bewail his loss,—but no issue whatever to attend their parent to his grave. The evidence upon this point is conclusive. In 1576, " Mungo Naper, burges of Edinbrucht, *brother* and AIR of *umquhile Alexander Naper of Ingliston*," pursues James Hill in Leith, Christian Simpson, his spouse, and *Isabel Litill*, " *relict*" of the said Alexander, there also styled burgess of Edinburgh, in reference to a buith and cellar, which Mungo claimed as the heir of Alexander.[1] The same thing, as well as the descent of the parties, can be fully proved by other evidence. This Isabell Litill really seems to have had no connection with the Birchleys of Hereford-

[1] Act. Dom. Con. et Sess. Vol. lxv. p. 29.

shire. It would appear from Andrew Napier, merchant, burgess of Edinburgh, brother of the Laird of Merchiston, being mentioned in 1569, in a legal transaction along with Helen Litill, wife of Alexander Gray, burgess of the said burgh,[1]—while he witnessed a deed of the previous Isabel, and her husband in 1566,[2] that these ladies were either sisters, or relatives. Admitting the fact, which seems extremely likely, the Napiers would then be connected with royalty, for it is a curious circumstance, and one possibly little known, that Helen was "*nwrice*" *(nurse,)* to James VI.[3] which lacteal relationship, it is not improbable, may have tended to aggrandize them.

It is, therefore, quite impossible that the English Napiers could in this way be descended from Merchiston, and as it is equally inpracticable to connect them otherwise, we may hold that their Merchiston origin is a mistake, and that, however subsequently

[1] Ib. Vol. xlv. p. 99.

[2] See Wood, Vol. ii. p. 288.

[3] Contract, dated at Stirling 28th June 1569, between "Alexander Gray, burgess of Edinbrucht, helen Litill his spouse, *Maistres nwrice* to oure Soverane lord the Kingis maiestie, Edward Litill, her broder," &c. Act. Dom. Con. et Sess. Vol. xlv. p. 99. The mother of Alexander Gray is here stated to be Marion Napier, probably a relative of the Merchistons. By a document, dated in 1567, in the Mar charter Chest, Nanis Gray, Helen's daughter, assisted her mother in her important avocation.

famous and well allied, they can reflect neither credit or discredit upon the Scottish Napiers.

Of the two individuals above mentioned—the sons of the supposed Alexander—Sir Robert Napier of Luton-hoo, was a Turkey merchant in the reign of James I; and Richard Napier of Linford, his brother,—"*the warlock of Oxford.*" The former, it was said at court, could not count three generations, but upon being knighted (previous to taking a baronetcy,) was assured by that Prince, in his usual characteristic manner, that he was a gentleman of old standing.[1] Sir Walter Scott here shrewdly observes, not much to the satisfaction of Mr. Napier, "that the British Solomon tendered his evidence thus readily, because his palm itched for the baronet's fees."[2] The learned gentleman, while charging Sir Walter with ignorance, owing to this remark, positively affirms that these two Napiers, and the inventor of logarithms, were near relatives—nay, even "*brother's sons*"—which circumstance, he rightly adds, is not generally known;[3] —in this event, they would be sons of a younger brother, (although a nonentity, it is conceived) of Sir Archibald, the inventor's father, and grandsons of Alexander Napier of Merchiston. It would have been highly obliging if Mr. Napier had conde-

[1] "By my saul," &c.—See Memoirs, p. 6.

[2] Ib. p. 7, *note.*

[3] Ibid. and p. 238.

scended upon evidence of the fact, which, if true, might have been had in abundance, owing to the recentness and extreme nearness of the connection. As if to compensate, however, for want of proof, he founds upon the resemblance which he fancies "the Warlock bore to our philosopher,"[1]—but to use a homely saying of the preceding monarch, "*like* is an *ill* mark," and the learned gentleman well knows, that it is no evidence in law; indeed, all the philosophers and wizards at the time, judging from their starched and owlish visages, as exemplified in pictures, where the same costume and attitude are observed, bore a wonderful likeness to each other—which makes the argument here resorted to still more dubious and questionable. Even the copy of Lord Napier's first attestation in 1625, in Hutchin's Dorsetshire—to which Mr. Napier refers—while it affirms that Alexander, the asserted parent of Sir Robert of Luton-hoo, and the Warlock, was brother of the philosopher's *grand*-father, (thus materially contradicting his account,) yet makes him *younger brother* of "*Sir Alexander* Napier of Merchiston.[2] Now, this clearly shews, that Alexander Napier of Ingliston was in view, because he, of all the members of the family, was alone placed in the singular situation, although lawful, of having an elder brother ("*Sir Alexander*") of the same Christian name with himself. Nay, Alexander of Ingliston is even

[1] Memoirs, p. 238. [2] Vol. II. p. 46.

the *only* Merchiston cadet of that Christian name, down to the time of the inventor of logarithms, who had a younger brother, Sir Alexander of Lauriestoun, who is well known, but could not possibly have been ancestor of Luton-hoo. In the above attestation of the first Lord Napier, there is a John foisted in at an earlier period, and made the ancestor of other English Napiers, but the fact is quite uninstructed; in other transcripts he is called James,—in short, as has been observed, these garbled statements, as to the supposed Scoto-English Napiers, contradictory of each other, and suppressing certain members of the family;[1] besides emerging from a foreign country, cannot be depended upon.

[1] The Mungo Napier, burgess of Edinburgh, who has been mentioned, is an entirely new personage, and the author has much pleasure in introducing him to his family. It may be observed, that what are given as Lord Napier's attestations in 1625, although they affect to be particular in the pedigree and connections, are yet silent as to him and the previous Andrew Napier, the burgess. "Andrew Naper, merchand burges of Edinbrucht," pursues Sir Archibald Nepar of Edinbellie, (*Merchiston*,) there designed "*broyer* to ye said complenair," in a civil suit in 1586. It can be further proved, that he married Janet Kyle, daughter of Adam Kyle, and Janet Meldrum, and that they were conjunct fiars of a "merchant buith," which they inherited from these relatives. These circumstances are stated, that they may serve as a clue to further discoveries. Andrew, it will be observed, was brother of the father of the inventor of logarithms,—consequently the uncle of the last, and although evidently not a person of note, his relationship with Merchiston, profession, and even more minute concerns, are easily instruct-

Act Dom. Con. et Sess. Vol. cv. p. 403.

Ib. Vol. cix. p. 12.

After all, however, it must still be remembered, that the biographer of Merchiston and his chief are only Napiers in the female line, and it may be observed, that they perhaps might have a better soil to work upon, if they investigated into the descent of their *male* ancestors, the Scots of Thirlestane. These Scots, there is ground to conclude, are a branch of the Buccleugh family, from whom they may have sprung about the middle of the fifteenth cen-

ed;—how then comes it to pass, that Mr. Napier can adduce no proof of such connection in behalf of the asserted father of the warlock, and Turkey merchant, (who were much more distinguished) although, according to his assertion, the former was in the same degree of propinquity, and actually, if we follow him, the *brother of Andrew?* With a similar view, this additional notice in 1573, of the previous Alexander and Mungo, is added, "Summondis—at ye instance of Schir Archibald Naper of edenbellie (*Merchiston,*) knyt pronevo, successor, and air be progress of umquhile Archibald Naper of Merchinston, aganis Mongo Naper burges of Edinburche, broyer, and air at ye leist, lauchfullie chargeit to enter as air to umquhile Alexander Naper, liferenter of tippirlin;" in relation to a tenement in Leith. The latter, it can be fully proved, was Alexander of Ingliston, who had also an interest in Tipperlin, which was a part of Merchiston, as is indeed sufficiently obvious from what has been already shewn. There is mention also of Issabel litill, "ye relict of ye said umquhile Alexander," and a seisin in the subject is referred to in his favor, bearing that "ye said umquhile Archibald, fayer to ye said umquhile Alexander, and grandschir to ye said Schir Archibald, deit, (vested in it) and that ye said umquhile Alexander wes neirest and lauchfull air of ye said umquhile Archibald, gottin betuix him and umquhile Mergaret Campbell, his spous."

Act Dom. Con. et. Sess. Vol. li. p. 68.

tury; and there is a historical incident connected with them that is singular and curious. They bear, as is well known, the double tressure, a part of the royal insignia, round their arms, with other additions, in consequence, as is said, of the striking loyalty of an ancestor towards James V., which is commemorated by Sir Walter Scott.[1] That prince, by a warrant dated at *Fala*-muire, 27th of July 1542, proceeding upon a preamble, that John Scot of Thirlestane came "to our host at Sautra-edge with three-score and ten launciers," and was willing to go with him to England, "when all our nobles, and others refused," therefore for his meritorious services upon that occasion, when "he was ready to stake all at our bidding," the King commands the "lyon-herald or his deputes," to grant

[1] "His ready lances Thirlestane brave
Arrayed beneath a banner bright,
The tressured fleur-de-lis he claims
To wreathe his shield, since royal James
Encamp'd by Fala's mossy wave,
The proud distinction grateful gave,
For faith 'midst feudal jars;
What time, save Thirlestane alone
Of Scotland's stubborn barons none
Would march to southern wars;
And hence, in fair remembrance worn,
Yon sheaf of spears his crest has borne;
Hence his high motto shines revealed,—
'Ready, aye Ready,' for the field."
*Lay of the Last Minstrel*, iv. 8.

to the said John "an border of flower-de-lisses about his coat of arms, sick as in our royal-banner, and alsewae an bundle of launces above his helmet, with thir words Readdy ay Readdy."[1] Pinkerton, in his History of Scotland, after shewing that James V. was not at Fala-muir until the ensuing October—when the disaffection among the nobles only first shewed itself—while the above warrant is dated at that place as early as July, infers that there is here either an error in the date, or that it must be a forged document.[2] The late Lord Napier was at pains to inquire into the matter, and informs us that, upon due inspection, what was called the warrant (for it was in his charter-chest), and supposed by Nisbet and others to have been an original, was merely a copy with an error, as he conceived, in the date by the transcribers.[3] Yet although there was thus no proper voucher for the grant, his lordship presumed that it must have taken place, as the "augmentation and motto, as described in the charter, are borne by the family at the *present* day."

The author, some years ago, discovered in his Majesty's State Paper Office a warrant by King William, under the sign manual, dated 18th of December 1700, which throws further light upon

[1] For this asserted document, see Nisbet, Vol. i. p. 98.

[2] Hist. Vol. ii. p. 381, *note*.

[3] See Wood, Vol. ii. p. 298.

the subject, and shews under what title the high privilege alluded to is now enjoyed by the family. The authority sets forth—That the lyon had represented to his Majesty, " that John Scott of Thirlestain, great-grandfather to Sir Francis Scott now of Thirlestain, having assisted our royal progenitor James the V., King of Scotland, at Sautrey Edge, with a troop of launcers of his friends and followers, and was ready to march into England against the English then invading Scotland, his said Majesty, as a reward of his good and faithful service, authorized and gave warrant to his lyon king of arms, to give the said John Scott a bordure of flowers-de-lis, siclike as in the royall bearing, a bundle of lances for his crest, *and two men armed with jacks and steel bonnets, with lances in their hands for supporters.*" After which the deed concludes as follows: " Of the truth of all which our said lyon king of armes is fully satisfied from good testimony, *and an old inventory of the writs and evidents of that family produced by him,* wherein the foresaid warrant is fully deduced, but beiring *that the Principal wyt itselfe cannot be found, without which, or a new warrant under our Royal hand,* he is not at freedom to assign to the said Francis the double tressure as born in our arms of Scotland; and wee being willing to gratify and honor the heirs and representatives of all loyall and valorous Progenitors, and to bestow a mark of our Royall favor upon the said Sir Francis Scot for good and

faithful services done, and to be done by him to us, Therefore we hereby authorize and order our Lyon King at Armes, in our said ancient kingdom of Scotland, to add to the Paternall coat of Armes of the said Sir Francis Scott a double tressure flowered, and contre-flowered with flower-de-lis as in our Royal armes of Scotland, and to give him crest, supporters, and other exterior ornaments as is above exprest, or as to him shall seem most proper."

It must be confessed, upon the whole, that there is something suspicious in this transaction. There was, hence, more than a century ago, no proper warrant or authority for the alleged grant in 1542—merely an inventory is referred to, and after all, it is not likely that either there, or in a copy, so palpable an error as was detected by Pinkerton—and countenancing the idea of forgery—should have been committed. Independently, too, of the unauthorized interpolation of supporters in the grant in 1700, of which there is no mention in the supposed warrant in 1542, the wording of the latter may not be altogether satisfactory; but, be this as it may, the homologatory act, or new concession, as it proceeds directly from the Sovereign, must be held of itself to be quite sufficient, and fully to vest in the family the transcendent privilege in question. The use of these arms in modern times, to which the late Lord Napier appeals, will not therefore prove the authenticity of the warrant in 1542, as that may be ascribed to an intervening circumstance, of which his

Lordship was unaware. It would truly be curious, —and, perhaps, no inferior test,—to ascertain what were the armorial bearings of the Scots of Thirlestane immediately after 1542, and in the course of the sixteenth century. We thus further find, contrary to some absurd usages in modern times, that no part of the Royal arms can be given to a subject without an express warrant from the Crown. It can also be proved that the same thing happened when the addition of the tressure was granted after the middle of the seventeenth century, to the noble families of Queensberry, and Aberdeen. The Royal tressure round the Sutherland arms was only authorized by the house of Hanover, and, it is believed to be the latest instance of the kind in the case of a noble family. In the same way, a border containing parts of the Royal arms of Spain was occasionally granted to some of the Spanish Grandees; and the fleurs-de-lis of France were conferred by Lewis the Eighteenth upon the Duke d'Avary for important services rendered by him to the King on the occasion of his escape from France about the time of the revolution.

Before quitting the present subject, due praise must be awarded the author of the Memoirs, for his manly and spirited vindication of Sir John Menteith—who had the misfortune, as the organ of government, to apprehend Wallace, and confine him, in his capacity of Governor of Dumbarton Castle, within the walls of that fortress—against the attacks

and obloquy of prejudiced persons, and most of our historians. The cases of the murder of Wallace, and the Duke of Enghien in modern times, are nearly similar, the functionaries on both occasions have been exclusively blamed, while the real guilt rested with their imperious masters, who were the sole originators, and in fact perpetrators of the act. Our respectable antiquarian Lord Hailes—a single hint of whom is often worth more than many lengthened discussions of later writers—has also been severely reflected upon, for no other reason than because he inclined, in his rigid adherence to truth, to the unpopular side of the question, and would not condemn an innocent individual without proper evidence. And, in fact, all that since transpires shews the justice of the opinion he had formed. The situation of Scotland at the time of Wallace's apprehension, was much like that of Germany and Spain before the Russian campaign, and overthrow of Napoleon. The greater part of the nobility and barons had become reconciled to the new order of things, and it was only by a change of events, and the battle of Bannockburn, that their minds received a sudden illumination, and they were induced to quit the side of the usurper, and espouse the interests of their country. Nay, even after that discomfiture, the Dunbars and Hamiltons for a short time adhered to the English.[1] These then were far more reprehen-

[1] It is well known that Patrick Dunbar, Earl of March, after the Battle of Bannockurn, received Edward II. into his Castle

sible than Menteith, who not only distinguished himself at Bannockburn, but was among the first, long before, to succour and support the cause of Bruce when it appeared doubtful or hopeless. His loyalty never afterwards suffered a stain, and he received, in return for his gallant services, a memorable mark of honour from Bruce, an accession of part of the arms

of Dunbar, and conveyed him safely to England. Immediately before that event he is proved to have been in the English interest, and Edward II., on the 28th of November 1313, thanks him and Adam Gordon for their advice and communications. *Rot. Scot. Vol. I.* p. 114. The latter, who was the ancestor of the Gordons, is here also found in default. Previously, on the 7th of the same month, Edward commends the fidelity of Adam, acknowledging the expense and labor he had incurred—" pro salva et secura custodia ville nostre de Rokesburgh ad opus nostrum, ut pro certo intelleximus, contra inimicorum et rebellium nostrorum partium illarum hostiles incursus et jacula." *Ib.* "Sir Walter Fitz-Gilbert," or (filius Gilberti,) as he is designed at the time, was the distinguished ancestor of the great family of Hamilton, whose subsequent loyalty there is every reason to praise; yet Barbour informs us, that after the Battle of Bannockburn, the remains of the English fled to Bothwell Castle :—

" That *than in the Inglis mennys fay*
*Wes*, and haldyn as place of wer.
*Schyr Waltre Gilbertson wes there*
*Capitane, and it had in ward.*
The Erle of Herefurd thyddyrward
Held, and wes tane in our the wall;
And fifty of hys men with all;
And set in houssis syndryly."——

Book xiii. l. 404, et seq.

It is proved by legal evidence that Sir Walter married Mary Gordon, probably a relative of the previous Adam Gordon.

of Scotland—also the royal tressure—to his paternal bearing, as is evident from original seals that are still preserved in the archives of the family of Mar. What is even more remarkable, he alone of all his family, and indeed of the barons and nobility of Scotland, *is not to be found in the lists of those who swore fealty to Edward I.* Thus, in heart he was a true Scottishman, and disdained an act which the heroic Douglasses, and our first patriots did not scruple to perform. Nay, in 1297, being imprisoned by Edward I., because he would not fight against his country, he would only purchase his freedom by becoming an exile, and accepting service under the English in their campaigns in France.[1]

The author of the Memoirs was induced to make his energetic appeal from a pious consideration, and a duty imposed upon him out of regard to the memory of an ancestor—To use his own words, "The family of Rusky, the honours of whose eldest coheiress descended to Napier, flowed from Sir John Menteith, second son of Walter Earl of Menteith, who was third son of Walter High Steward of Scotland. This lineal ancestor of our philosopher has been much and groundlessly maligned; and, to remove an idle calumny from the honourable house of Menteith, as to clear history of a blot and fable. Who in his reminiscences of nursery lore, is unmindful of the Wallace wight, and his false friend

[1] Rymer, Vol. ii. p. 782.

the *traitor Menteith?* To the nursery should that fable be confined."[1]

After this we must deeply regret, that neither the Ruskys, or the inventor of Logarithms, can trace a descent—at least legitimately—from Sir John; and the blood of the Merchistons would receive no stain, even supposing the latter had been the "*immanis traditor*," the black fiend, that has been represented. The motive, therefore, for the defence of Menteith, that has inspired the learned author of the Memoirs, being, alas! of an elusory kind, is somewhat akin to the veneration of the knight of La Mancha for his mistress,—or, to use a grander simile, like the fabric of a vision, that leaveth not a wreck behind.

The Sir John Menteith in question, espoused Elyne, daughter of the Earl of Mar—"from whose fair stem most tempting fruit have grown." The tempting fruit, however, with the exception of a son John, who died without issue, were only daughters, and while the Menteiths of Rusky are not sprung from any of them, it is certain that Christian, the eldest, married Sir Edward Keith, and that, through her, the House of Erskine, as *heirs-general* of her mother Elyne, (the only wife of Sir John Menteith,) succeeded eventually to the Earldom of Mar.[2] So

[1] Memoirs, p. 527.

[2] The essential authorities for these allegations are the following:—

On the 22d of July 1310, Edward II. in consequence of Sir

far, therefore, from Sir John being, as Mr. Napier asserts, the " lineal ancestor of our philosopher," he properly had nothing to do with him, but stands in that relation to the family of Erskine, and their re-

John Menteith, there styled the King's rebel, adhering to Robert Bruce, gives his lands of *Knapdale* in Argyleshire, to John the son of Swienus de Ergadia, *Rot. Scot.* Vol. I. p. 90, b. This was some years before the battle of Bannockburn, and in 1309 he is one of Bruce's negociators. See Hailes' Annals, Vol. II. p. 35.

Charter by Robert Bruce in 1316, to Sir John Menteith, and his heirs of the lands of Glen Breryche, and Aulesai in Kentyre, &c. *Mar Charter Chest.*

Charter by David II. in 1357, stating, that at the suggestions of some, he had taken the lands of Strongartney in Perthshire, " a Johanne de Meneteth milite *consanguineo nostro*," and had infeft John de Logy in the same; but remembering that his father had granted them by charter, " quondam *Johanni de Meneteith militi, patri* predicti Johannis Menteith et *Elene de Marr spouse* ejusdem *nepti suæ*, et *hæredibus eorundem*," he " therefore restores them to Sir John the son, " *secundum tenorem dicte carte.*" Elen is here styled the King's niece, because her mother, as is well known, the wife of Gratney Earl of Marr, was sister of Robert Bruce. *Ibid.*

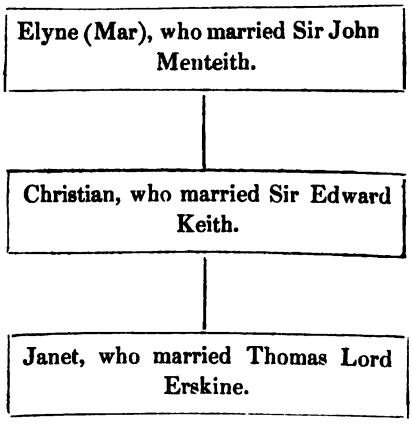
Charter by Sir John Menteith, Lord of Arran, to Sir Edward Keith and *Christian* his spouse, *sister* to the said Sir John, of lands in Aberdeenshire, in the year 1343. *Mar Charter Chest.* This is obviously Sir John the son.

Charter by " Johannes de Menethet dominus de arane et de *Knapdalle*" (in North Kentyre,) of certain lands, to the Abbey of Kilwinning, " pro salute anime meæ, *et Katharine* quondam *spouse meæ*," dated 12th October 1357 *Regist. Dav.* II. p. 34. In modern times, it has been absurdly pretended, without a particle of proof, that this John married the preceding Elyne de

presentative the present Earl of Mar, who in this manner ran some risk of being deprived of his *status* and dignity. The Erskines were co-heirs both

Marr—in other words, his mother, and was only second son of Sir John his father.

In corroboration of the above statement, and the descent down to the Erskines, see Lord Hailes' Sutherland case, Chap. v. § 11, p. 43. The pedigree his Lordship gives is as follows:—




And it can be proved additionally by documents in the Mar Charter Chests, that it was in virtue of this descent that the Erskine family were anciently served heirs of the Earls of Marr, and had the Earldom of the latter allowed them. It need not be observed that the fact of the lineal representation, (identified with the succession to the Earldom of Mar,) devolving upon Janet through Christian Menteith, clearly extinguishes Sir John the son, and the male issue upon his line. Mr. Napier probably has been misled by a confused and partly erroneous pedigree of the Menteiths, in Wood, Vol. II. p. 224. Douglas gives *rather* a better account of the matter. See his Peerage, p. 473.

of the Earls of Mar, and of Sir John Menteith, along with the Lords Lyle, who perhaps may be in the same situation in respect to the Earldom of Mar, as the Napiers to the Earldom of Lennox, for it can be proved that they had certain rights and inheritances in virtue of their junior representationship. Joanna, another daughter of Sir John, being designed in the time of Robert Bruce, "filie quondam Joannis de Menteith militis," was one of the wives of Malisius Earl of Strathearn. She was not the Lady implicated, along with Soulis, in the conspiracy against the same monarch, (whose name was Mary,) and she was alive in 1361, when she is styled, "Comitissa de Strathern, "as Keith has shewn in his Bishops, upon the authority of the Chartulary of Cambuskenneth. It is evident that her issue, if she had any, must have failed. The preceding noble traitress was quite in the English interests, for a charter passed in the reign of David II., in favour of Maurice Murray, of certain lands which are said to be "in manibus regis, *ratione forisfacture Mariæ* de Strathern *Comitissæ de eadem*, quondam nuptiatæ domino Willielmo Hambletoun, anglo et inimico nostro." Fordun informs us, that the Countess of Strathern and Sowlis, were convicted by the black Parliament in 1320, "de *crimine læsæ majestatis*." Owing to the unmerited odium that has been cast upon the family of Joanna, the heavy offence in question has also upon some occasions even been attached to herself.

Rob. Ind. p. 18.

P. 103.

M. S. Ad. Lib. (Jac. 5. 5. 6.) & Rob. Ind. p. 46.

Lib. xiii. c. i.

# REMARKS

UPON THE

## LAW OF LEGITIMATION,

*PER SUBSEQUENS MATRIMONIUM;*

THE NATURE OF OUR ANCIENT CANONS,

AND

QUESTION OF THE LEGITIMACY OF THE STEWARTS, &c. &c.

# REMARKS, &c.

THE earliest precedent that has been appealed to in support of our doctrine of legitimation *per subsequens matrimonium*, (for that of Robert II. and Elizabeth Mure, as will be afterwards seen, is far from unexceptionable) is the noted case of Sempill, reported by Craig, which has long been received as a standard rule, and perfectly relevant and conclusive. Craig, after stating that "legitimati ex subsequenti matrimonio in eodem sunt gradu cum legitimis," adds that, thirty-four years previously, Robert, Master of Sempill, the father of Robert, Lord Sempill at the time, ordered himself when *in articulo mortis*, to be carried in a litter to church, where, he married Joanna Hamilton, his concubine, by whom he had that nobleman, and dying only eight days after, the latter "non minus in hæreditate successit quam si ex legitimo matrimonio natus fuisset."[1]

[1] The entire relative passage is as follows,—"Nostris autem moribus, legitimati ex subsequente matrimonio in eodem sunt gradu

Trusting to this account nothing can be conceived more satisfactory and in point, because many commentators have denied the validity of such an act, when in *lecto ægritudinis*; and the question as is well-known, has excited much controversy. It has been argued, that as succession in general involves a right to land, the solemnities which affect it should equally here apply; and as land cannot be conveyed on death-bed, the marriage of a person necessarily is unlawful when contracted in that situation. Nay, Sir James Stewart is of opinion, that a person cannot marry "on death-bed in order to the legitimation of natural children in prejudice of his agnats who would otherwise succeed." He even styles it "the worst deed that a man can do on death-bed in prejudice of his heirs,"[1]—thus clearly admitting the principle so far, in respect to the collateral heirs.

The previous Robert, alleged son of Joanna Ha-

cum legitimis—Memini *enim* ante annos 34. Robertum Magistrum de Sempil, patrem Roberti nunc principis illius familiæ, cum ex concubinatu Joannæ Hamiltoniæ hunc ipsum filium suscepisset, et ei impense faveret, in articulo mortis, cum sibi decedendum videret, ad ædem sacram se in lectica deferri curasse, ibique nuptiis solenniter peractis, cum domum rediisset, octavo post die fatis concessisse, ex quo subsequente matrimonio, licet in lecto ægritudinis, in quo decessit, solenniter peracto, filius antea susceptus non minus in hereditate successit quam si ex legitimo matrimonio natus fuisset." Lib. II. Dieg. 13, § 27.

[1] Answers to Dirletoun, p. 191 and 180.

milton, not only succeeded to the estate but to the honours of Lord Robert *his grandfather*, through his father Robert the Master who predeceased; and hence he must be held to have been completely lawful. This forms another specialty, because it has also been doubted, if by such a transaction the interests of a grandfather or ascendants, and their representation and succession, can be compromised.

Owing to these striking characteristics of the case, it was deemed proper narrowly to sift the circumstances stated by Craig; and although he is far from being famed for his accuracy, the result, it is rather thought, may excite surprise and astonishment.

Craig clearly alludes to Robert Master of Sempill who died in 1569, for that was thirty-four years (the period he himself mentions) previous to 1603, at which time, or shortly after, he may have completed his work, as he dedicates it to James I. subsequent to the union of the crowns, (which was in the latter year,) and departed this life in 1608.[1] It is also legally instructed that the Master had a son Robert, who succeeded his grandfather, Robert Lord Sempill in 1572;[2] and as there was no previous

[1] See the editions of *de Feudis*, and especially that of Baillie.

[2] Will, dated 8th November 1572, of Robert Lord Sempill, wherein he appoints James Earl of Morton, tutor testamentar to Robert Sempill "his *oy* (grandson) *sone lauchful* to umquhile Robert Maister of Sempill, his appeirand are." Robert is also there styled, "now my apperand are," *Register of Testaments of Commissary Court of Edinburgh.* And on the 10th July 1576,

Robert Master of Sempill, who pre-deceased his father during the same century, there cannot be a question that the former was the individual whom Craig had in his eye. Such being the circumstances of the family, we will now see how the facts stand.

' On the last of April 1569, Grizel Sempill pursues a removal against *Robert Master of Sempill*, her brother, " *Barbara Preston* HIS SPOUSE PUTATIVE," &c. out of her house of Blair, complaining " that quhare ye said Grissell passand fra hir house and place of Blair liand within ye Lordship of Culross, and Scheriffdome of Perth, to ye burghe of Striveling, to do her lefull business yerin in *ye moneth of Februar last* bipast, left ye said Robert Maister of Sempill hir broyer, and *Barbara Preston* his SPOUSE PUTATIVE *as ye said lady supposis*, in hir said place with ye keyis of ye yettis and durris of ye samyn, and hir plenissing," &c.—believing that she would have had the same " to her using" upon her return ;—nevertheless, Robert withheld the place of Blair with her effects, and would not deliver them to her, &c. &c.[1]

" *Robert Lorde Sempill*," with advice of *James Earl of Morton* his *tutor testamentar*, pursues an action against his tenants. *Act. Dom. Con. et Sess.* Vol. lxiv. p. 163, b.

[1] Act. Dom. Con. et Sess, Vol. xli. p. 331.—Judgment past in favour of the pursuer. Barbara is twice designed *spouse putative* in the Record. The latter being simply styled Barbara Preston is quite immaterial ; the wives of noblemen in judicial proceeding, took only their maiden appellation.

So far then from there being any trace of Joanna Hamilton, who, if we are to believe Craig, must have been his concubine at the time, the Master is actually cohabiting with a totally different person, one Barbara Preston, who was by habit and repute his wife. By another entry relative to the same business, she is proved to be the daughter of Archibald Preston of Valleyfield;[1] and, on the 16th of December 1569, the Master being dead, an edict of the Commissaries cites the *spouse* and *barnis* of "umquhile Robert Maister of Sempill," for their interest, "and, *in speciall*, Archibald Preston of Weliefieild, *Barbara Preston* his dochter," to hear and see executors datives, decerned to him.[2]

Thus, in 1526, George Earl of Huntly pursues "*Mergret Steward* his moder, ande *Elizabeth hay* his forgrandame, and *Elizabeth Gray*, his grantschires wif," stating, that as "his haile leving is in the handis of ye saidis ladyis be resone of terce," &c., he has nothing, and therefore prays for a "competent leving for his sustentatione." Act. Dom. Con. Vol. xxviii. p. 402. The two last were Countesses of Huntly, and the first, Lady Gordon, her husband John Lord Gordon, having predeceased his father. Elizabeth Hay was the Lady mentioned in the Appendix to a previous article, whom her vacillating spouse, while he abandoned his previous wife, thus quartered upon his estate to the prejudice of his posterity. The Earl in the present instance, was not her descendant, although she is called his "forgrandame," that is only *in law*, in a sense in which such expressions are occasionally used.

See p. 85.

[1] Ib. p. 390.

[2] Act and Decreet Book of the Commissary Court of Edinburgh.

These circumstances are obviously incompatible with the story of Craig, which they decidedly refute. Where he could have discovered this phantom of a Joanna Hamilton it is impossible to conceive, for every authority assigns Barbara to the Master as his spouse. Crawfurd, who wrote nearly a century and a half ago, expressly states that Robert the Master had " an only son Robert—by *Barbara Preston his wife daughter of Archibald Preston of Valleyfield.*"[1] It is very true that our genealogists are not to be trusted, but when we find Crawford, who was of Renfrewshire, where the Sempill estates lay, so correct in the names of the parties, besides having access to the Sempill charter chest, and actually referring, in support of his allegation, to " *Charta penes Dominum Semple,*"[2] we cannot bring ourselves to disbelieve the fact,—especially when corroborated by the Commissaries' edict, which of itself may establish it. Barbara Preston is also asserted to have married, secondly, Robert Mure of Caldwell,[3]

[1] Peerage, p. 442. Hist. Renfrewshire, new Edit. p. 77.

[2] Ib. He also refers in both of these works, in illustration of the Sempill descent, to other documents in the Sempill Charter Chest.

[3] See pedigree of the Mures of Caldwell, ap. Robertson's History of Renfrewshire, p. 307, drawn up, as the author knows, by the agent of the family. Crawfurd also, in his MS. genealogical Collections in the Advocates' Library, states that " Barbara Preston, Mistress of Semple, daughter of Archibald Preston of Valleyfield, married secondly Robert Mure of Caldwell."

and it can be proved by an entry upon record, dated 12th of March 1587, that the curators of Lord Robert, the son of the Master, were Robert Mure of Caldwell, Archibald Preston of Valleyfield, James Preston his son, and David Preston of Craigmiller, &c.[1] the very persons most likely to fill the office, holding him to be the son of Barbara.

We must therefore refuse all weight and credit to Craig's precedent, in support of the law he inculcates. There is no way of defending its accuracy—put the most favourable alternative, that he strangely transfers to Joanna Hamilton what actually happened to Barbara Preston, still he is in default,—the case cannot be, as he represents, an abstract one of legitimation *per subsequens matrimonium*, either during health or on death-bed,—for it turns out, by the express evidence of the Master's sister, that Barbara was, months before his death, habit and repute his wife, and cohabiting with him as such. This is a most important consideration, and enough alone, according to our notions, to constitute a marriage;—nay, even in that century it was regarded in the same way; for in 1573, in the action of bastardy at the instance of Alison Dunbar against Christian Adair, it was successfully maintained by Alison, that the fact of certain parties having "duelt togidder, and entertenit utheris as mariit folkis, at ye leist as weddit personis *subsecuta copula,—is*

[1] Act Dom. Conc. et Sess. Vol. cx. p. 552.

*equivalent to marriage endit, and perfitit per verba de presenti,*"[1] while as to *copula* in the present instance before the death of the Master, there can be no doubt. Independently, too, when we find such flagrant errors in essentials, nothing in Craig's account can be admitted,—either the excursion to church in a litter—the solemn performance of the marriage there, with it seems a non-entity—or the death of the bride-groom only eight days after. The principle of *falsum in uno, falsum in omnibus*, may here apply; and these occurrences, presumed to be quite ideal, and the mere creatures of the perplexed and treacherous fancy of this singular, although elegant writer.

Neither can it escape attention, that Craig was a cotemporary both of the Master and his son, and hence is the less excusable for being so very incorrect,—this is indeed a weighty circumstance, as it may impeach his authority as a lawyer, and throw doubt and suspicion upon all his allegations.

The case of Sempill being therefore irrelevant, or at least most ambiguous, it shall next be attempted to supply the deficiency thus occasioned, by other authorities relative to legitimation *per subsequens matrimonium*, shortly before and after the reformation.

In an action of bastardy in 1564, by William

[1] Act and Decreet Book of the Commissary Court of Edinburgh, under date 20th May 1573.

Crawfurd, against his nephew, James Crawfurd, this defence, " in quantum de jure relevat," was admitted by the Commissaries to probation—that, granting James the nephew *to have been born in fornication* between Robert Crawfurd and Katherine Smyth, his deceased parents, " in the yeir of god 1548, yai yan being solut personis," yet the " said umquhile Robert, about ye feist of candilmes ye yeir of god 1549 yeris, conforme to ye use usit for ye tyme in yis realme, weddit ye said James mother,[1] foirsaid, *per verba de futuro*, promisand to take hir to his spousit wyfe be ane priest, and in presence of diverse famouse witnes, quha yairefter kepit house and cumpany wyt his said moyer, as weddit folkis, continualie quhill ye moneth of Januar ye yeir of god 1553 yeris, in ye quhilk moneth and yeir ye said Robert mariet *per verba de presenti*, ye said Katherine, mother to ye saide James, be Schir Adame gilry, curat of ye Abbay of Halierudhouse, and of ye parochin yairof, within ye quhilk his said father and moyer yan duelt, in ye kirk of field wynd of yis bruche, oppinlie *in his owne house* yair, about nyne houris before none, and in presens of diverse famous witnes, *and ye said James, Johne Crawfurd, his bruther-german, yit on lyfe, and violet Crawfurd, yair sister-germane, yat is deceissit, put under ye cairclaith as use wes, quhaire ye said umquhile Robert affirmet* yame *all to be his barnis*,

[1] *i. e.* James's mother.

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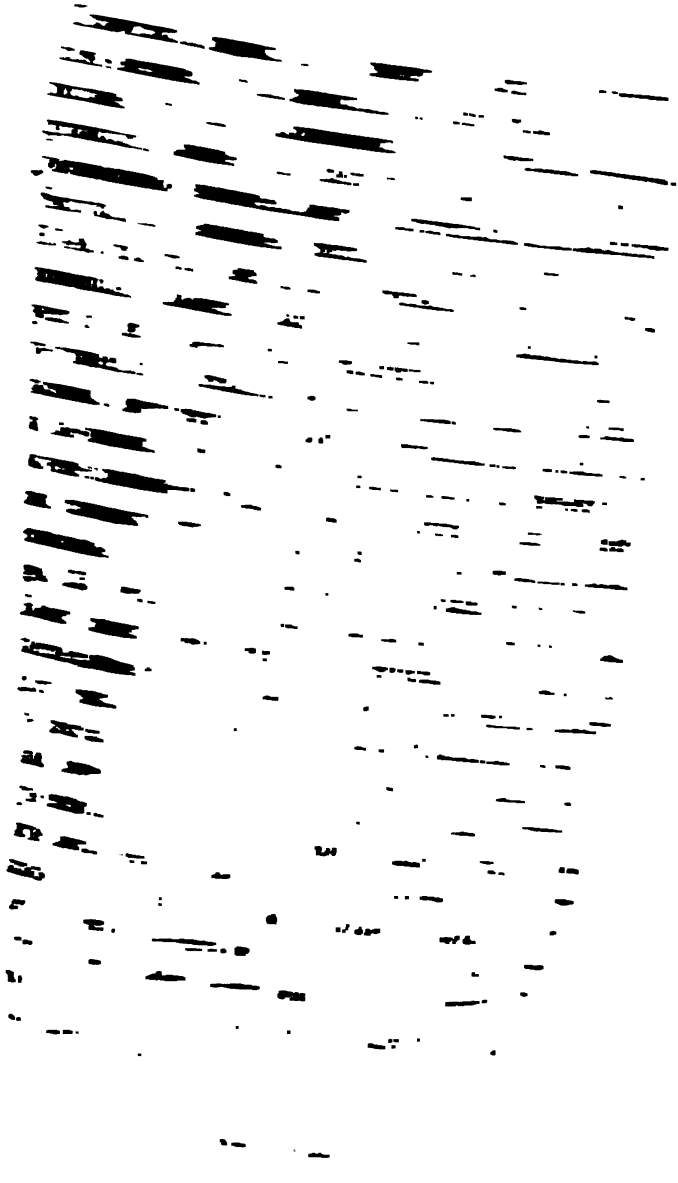

and yairby, not onlie ye said James, bot ye rest of ye said Roberts barnis, *be ressone of ye marriage forsaid subsequent*, the first offence yairby being purgit, *wes maid lauchfull*, lik as ye said umquhile robert kepit hous with ye said katherine his wyf continualie yaireftir, quhill his deceis quhilk wes be space of VI moneths nixt yarefter at lammes, or yaireby, and yai all yat tyme repute and haldin mareit folkis, lik as yai wer, *and sua be ye commone law, and dailie practik of yis realme*, howbeit ye said James *had bene gottin and borne in fornication*, yit be ye mariage forsaid following yerefter betuix his said father and moyer, *he was maid lauchfull*, and yairfor aucht to be decernit lauchful, and to succeid to his landis gudis." The Commissaries, however, farther qualify their interlocutor, by "reservand alwayes ye juris and discussion of ye lawis and juris proponit be ye said William *quo ad habilitatem succedendi* prout de jure, in case ye said exceptione be provin."[1]

The above curious solemnity, still familiar to the lower orders in Scotland, of putting the legitimated offspring under the cair or sponsal cloth—thus symbolically expressing the act of legitimacy and inauguration into their new status—was especially adopted by us before the Reformation, when we were addicted to ceremonials of all kinds. An excerpt

[1] Acts and Decreets of the Commissary Court of Edinburgh, under date 7th of June 1564.

of a notorial instrument in 1557, bears, that at that time, John Hamilton of Broomhill, and Elizabeth Hamilton were solemnly married "in the face of Holy Kirk," in John's chapel of Broomhill, "they holding their son, Claud Hamilton, *under spusit claught*, betwixt them."[1] This, indeed is an earlier instance than the preceding, of legitimation, per subsequens matrimonium. The observance is of very ancient institution, and was practised originally both in France and England.

The sponsal or "spousit" cloth is explained by Furetiere to be "ce drap qu'on estend sur ceux qui se marient, que les Latins appelle *pallium* d'ou vient qu'on dit mettre les enfants sous le poile; de la ceremonie qui se fait pour legitimer des enfants naturels par un subsequent mariage, en les mettant sous ce poile." The former is thus also synonymous with *Pallium* or *Poile*, which, according to this author, Borel derives from "paille vieux mot François qu'il dit avoir signifié *dais pavillon*, et *manteau*."[2] Menage gives the same explanation of Poile or Pallium, and adds, in illustration of the custom anciently, this passage from the history of Normandy, by William Abot of Jumieges.[3] "Comes Ricardus Gunnorem Comitissam more christiano sibi copulavit, filiique, qui jam ex ea nati erant, interim

[1] See Anderson's History of the House of Hamilton, Supp. p. 427.

[2] Dict. Univers. sub voce *Poile*.

[3] Book viii. c. 36.

dum sponsalia agerentur cum patre et matre pallio cooperti sunt."[1] Du Cange derives it from the old forms in the case of adoption, " Cujus ritus initium (he says) fluxisse arbitror ab eo, qui in adoptionibus observabatur: quippe adoptivos pallio ac stola propria adoptantis quodamodo involvebant, ut ab iis quasi prognatos indicarent—ita in legitimationibus per subsequens matrimonium, liberi in ipsis nuptiarum solennibus, cum patre, et matre, pallio cooperiuntur, ut ab iis legitima conjunctione procreati innuantur."[2] Selden shews that the usage obtained in distant times in England—the offspring being placed " sub Pallio super Parentes eorum extento;" and that it was even observed in Parliament, when, by their authority, the children of John of Gaunt, by Catherine his third wife, although born in adultery, were legitimated.[3]

The sponsal cloth is also, as has been seen, designated the " *Cair*-cloth," possibly because referring to an expiatory act, and purging an offence—to use the words in the above case of Crawfurd—" as *Kar*" or " Cair in the Teutonic, denotes " *restitutio, damni reparatio.*[4] Car, too, may be derived from *Caresmes (Lent,)* when white or car clothes were worn, which, as expressive of religious contrition, may have been the colour of the pallium, in the

[1] Dict. Etymolog. Edit. 1750.
[2] Du Cange *voce Pallium.*
[3] Dissertation *ad Fletam.*
[4] Glossar. Germanic. Haltansian, *sub hac voce.*

previous ceremony. In this sense, " *Cair* weeds" is used with us to signify *mourning* weeds.[1] When Christianity was introduced into Ireland, converts were obliged to envelope themselves in the above habiliments, which they so much detested, that many, especially old men, died in the act of wearing them.

The instance of Crawfurd goes far to fix that a subsequent marriage between " solut personis," by the common law in 1564, legitimated the issue previously begot. But, as may partly have transpired, a specialty had been started, that was reserved by the Commissaries for future argument—even in the event of the peremptory defence, as it is styled, being duly instructed. The pursuer contended, that however capable of being admitted into holy orders, —and so far lawful, the defender was incapable, notwithstanding his parents' subsequent marriage, of succeeding to his lands and heritages, owing to the following reasons :—That the marriage was clandestine, not being celebrated in facie ecclesie, but only in the house of his father ;[2] and, in respect to this

[1] See Jameson.

[2] A private or clandestine marriage, of this nature, before the Reformation, between parties within the forbidden degrees, although ignorant of their relationship, certainly was null, and the children were illegitimate, without a possibility of the intervention of the principle of *bona fides*, which, in other circumstances would have availed. The character of the proceeding, however susceptible of a different construction, was held, from its secrecy and informality, to induce a presumption of *mala fides*, and to

matter, " quoties agitur de probatione matrimonii debet intervenire probatio per instrumenta aut scripturam alioque ad succedendum non sunt legitimi;" for " uyer wayes yair myt follow ane greit inconvenient, viz. yat in sik allegit privie mariage, ye ryt of greit heretaige and landis may be takin away be witness quhilk, gif it wer ressavit in dailie practyk, wer ane greit inconvenient, and als suld follow yat albeit landis may not be provin sauld nisi per scripta,

impeach the sincerity of the parties. To counteract it, independently of the plea of ignorance, the open celebration of the mariage in *facie* Ecclesie was indispensable. In a curious action of bastardy in 1556, at the instance of Richard Rutherford of Edgerston against John Steward of Traequair, this was held to be a relevant objection, and admitted to probation—" quia tempore contractus hujusmodi pretensi matrimonii,* si quod fuit, dicti quondam Jacobus et Katherina attingebant sibi ipsis in tertio et tertio gradibus consanguinitatis de jure prohibitis—nulla proclamatione bannorum, et publicatione hujusmodi matrimonii prehabita in ecclesiis parochialibus personarum ubi dictus quondam Jacobus et quondam Katherina tunc temporis moram agebant, et sic hujusmodi matrimonium *fuit in se clandestinum*, si quod fuit contractum, et de jure si qui matrimonium seu conjugia clandestina etiam ignoranter contraxerint in gradu prohibito, inhibitione, seu publicatione bannorum minime precedentibus, et in proposito soboles ex tali conjugio sine matrimonio concepta prorsus illegitima censetur." *Traquair Charter Chest.* Rutherford, however, failed in his proof, and Stewart was found to be lawful by the Judge Ordinary, the official of Glasgow.

* Asserted to have been contracted between a previous James Steward of Traequair and Katherine Rutherford, (one of the co-heiresses of Rutherford,) the progenitors of John, the defender.

yit neveryeless ye richt and succession yerto suld stand and consist in ye deposition of witnes."[1] This is an argument that has already been noticed, and not destitute of plausibility. As the case was however thought liable to a specialty, and more particularly, as it was not pushed to a decision, it may be advisable to adduce another of a simpler and more unexceptionable kind—only observing by the way, that we seem in this manner originally to have been strict in our notions of the constitution of marriage, and to have adopted a far different principle than is received in modern times.

Such a precedent occurs shortly after, in the year 1569. Janet Kennedy[2] was decerned by the Commissaries to be lawful, in an action of bastardy raised against her, because "umquhile Elizabeth Cairns hir moder schortlie *efter ye time of her birth*, viz. betuix ye feist of mydsummer and lambes, (1560) was lauchfullie merriet wyt her said father, per verba de presenti be schir Thomas Eklis, than Vicar pensionar, and Curat of ye kirk of Colmonell, and now redar at ye samyn kirk, the saide Janet than being present at ye completing of ye saide meriage, recognoscit and put be hir said parentis under ye cairclaith *in wirification yat her saidis parentis maid hir perticipiant of ye said meriage*,

[1] Acts and Decreets, as before, under date 20th June 1564.

[2] This was one of the Orchardton heirs-portioners, see Pp. 100—2, *note*.

*as use wes of befoir*, as yer barne, than being present, and exhibit be yame for yat effect, and sua scho is lauchfull dochter to yame lik as scho hes bene contenuale sen yat tyme, and yit is haldin and reput lik as in deid and veritie, and be vertue of ane brief direct fourt of our soveraine lordis deirest moderis chapill (July 1561,) ye saide Janett is fund and retoured and decerned lauchfull dochter and neirest air to hir said moder."[1]

The parents being free, and their marriage, as far as can be seen, public and regular, no objection could be here urged, and hence the decision and retour to which it alludes are conclusive upon the material point. It also transpires, that when Janet Kennedy was prosecuting her brief to be served heir to her mother, the adverse party in the case appeared, and was admitted for her interest to object. Such was the form in these days, contrary to our present law, which allows no opposition of the kind without a competing brief.

Other glimpses of the same law are discoverable of an earlier date. Thus a relevant ground in the previous action of bastardy by Rutherfurd of Edgerston, against Stewart of Traquair, is, that William, Stewart's father, had been born of his parents " nullo matrimonio *unquam tempore ullo preterito* contracto, et in facie Ecclesie solemnizato." The words being not *antea* contracto, but general, so as

[1] Acts and Decreets, as above, under date last of January 1569.

to comprize any space of time, even after John's birth, clearly argue that he could have been legitimated *per subsequens matrimonium*. The clause in an act of Parliament in 1516, is equally strong, declaring that Alexander Stewart, natural son of John Duke of Albany "suld be reput borne bastard and unlegitimat be ony marriage." Here the supposition of his being legitimated subsequently, is virtually admitted.

It, therefore, now appears incontestable, that we had received the doctrine of legitimation *ex subsequenti matrimonio* at least before the Reformation, —most probably from the canon law—although at the sametime this is to be taken with limitation; for it must be kept in view, that that law, during Catholicism, was often modified, and obliged to yield in some degree to local prejudices and institutions. This is a nice and curious subject, which seemingly has not yet met with the attention it deserved. One of the alternate conclusions in the previous action of bastardy (Rutherford against Stewart) sets forth, without any reference to the Apostolic canons—"*quod de consuetudine* et *practica hujus regni* inviolabiter observata *ultra memoriam hominum*; proles genitæ inter consanguineos de jure contrahere vetitos ante matrimonium, licet postea desuper dispensatum fuerit inter hujusmodi personas super tali impedimento, matrimonio desuper

[1] Acts of Parliament, Vol. ii. p. 283.

subsecuto, hujusmodi proles natæ et genitæ, ante prefatam dispensationem et matrimonium predictum, et dispensationem subsequentem, non efficiuntur legitimæ quoad successionem paternam seu maternam." The natural inference from this intimation is, that there was a law and practice in these matters peculiar to Scotland, without being controlled by any foreign authority.

Pope Honorius had, as early as 1225, delegated to our clergy the high privilege of holding what were termed provincial councils;[1] where it appears they enacted constitutions, statutes, and canons, and adjusted various regulations, both connected with the law and the general polity of religion. This they contrived to effect without the interposition of a legate,[2] and in opposition to the artful intrigues of the church of Rome afterwards, to counteract an indulgence which she soon saw would be prejudicial to the Papal prerogative. On our clergy therefore devolved to a certain degree a spiritual legislative power, independently of their ordinary jurisdiction in all consistorial matters; while this important, though natural conclusion, is further evinced by their enactments, being pointedly respected and recognized even by Rome herself.

[1] His bull is prefixed to the Scottish canons, see Hailes' Ann. Vol. iii. p. 145. It is addressed to the Scottish Bishops; and, after alluding to their having no archbishop, and the distance of Scotland from Rome, allows them simply, without any intervention, to hold a provincial council.

[2] See Hailes' Ann. ib. p. 211.

A plenary indulgence or dispensation has lately been discovered from the Pope in 1529, directed to Gilbert, Canon of Aberdeen, and Murray, apostolic notary, allowing certain parties to marry, notwithstanding their being within the forbidden degrees. This was an infringement upon the canons of both countries, and accordingly the dispensation is at pains to declare such connection valid; "constitutionibus et ordinationibus apostolicis; AC *statutis et consuetudinibus tam provincialibus quam synodalibus contrariis, non obstantibus.*"[1] Further, the parties are absolved from the excommunication they had incurred owing to their incestuous connection, "*per constitutiones provinciales,*" that is to say, by those of Scotland alone. The "constitutiones," or "consuetudines provinciales," are the laws enacted by our provincial councils, and the synodical by the bishops in their dioceses, both being, as above evident, palpably contra-distinguished from the Papal, or apostolic.[2] Although our constitutiones were provincial *quoad* Rome, they, however, sometimes were styled *general* in reference to Scotland. After such marked allusion to the Scottish canons at the same time with those of the mother church, it seems unnecessary to attempt to inculcate that the former were somewhat different from the latter. Unless a distinction had

[1] Altyre Charter Chest. The papal power so far, became a part of the common law.

[2] Under the head of "Canons of the General Church," Butler comprises the *apostolic* constitutions. Horæ Jurid. subseciv. Pp. 157—9.

existed, Rome, from her grasping policy, would have been the last to notice them, and thus sanction what would have the effect of affixing limits to her authority. The same thing is further evident, by an earlier bull, or indulgence from the Pope in 1429, where Elizabeth, the heiress of Gordon, is said to have contracted marriage with Alexander Seton, "*per verba de presenti juxta morem patriæ.*"[1] The *juxta morem patriæ*, it is evident, would not have been mentioned, supposing the Papal law had been exclusively followed.

The spirit, patriotism, and address of the ancient Scottish clergy, commemorated in history, the undaunted resistance of William the Lyon to the See of Rome, and its extreme distance from Scotland may have tended to wring from the Popes this proud recognition of her ecclesiastical independency. At the sametime, it may be observed, that the power in question was in some degree imparted to other countries. Thus, "every nation in Christendom," Butler says, "had its own national canon law;"[2] but although, he adds, that the English "provincial constitutions," were the decrees of provincial assemblies, held under diverse archbishops of Canterbury,[3]—their canons or constitutions would appear chiefly to have been "*Legatine*," and enacted under the authority of the Cardinals Otho and

[1] Gordon Charter Chest.

[2] Horæ Jurid. subseciv. p. 180.

[3] Ib. p. 181.

Othoboni, *legates*,—who, it is well known, had been deputed by the Popes Gregory the Ninth, and Clement the Fourth, to England, for the purpose. Accordingly, in English dispensations similar to the Scottish one above referred to in 1529, there is a striking difference. The dispensation for the marriage of Margaret of England in 1500 is granted in these words,—" non obstantibus ætatis premissæ defectu,[1]—et aliis consanguinitatis et affinitatis impedimentis predictis et apostolicis; nec non *bonæ memoriæ Ottonis et Ottoboni, olim in dicto regno Anglie Apostolicæ sedis legatorum*, in provincialibus quoque et in synodalibus editis generalibus vel specialibus constitutionibus, et ordinationibus, cæterisque contrariis quibuscunque."[2] Here the share that Rome had through her emissaries in concocting the English provincial canons is carefully specified, which affords a strong contrast to the form on such occasions in Scotland, where the interference of the legates being excluded, there is no such qualification to be found.

The distinction is curiously marked by another bull or dispensation to parties within the forbidden degrees in the " province of *Ireland*," and in Scotland, directed to Mr. John Spens, clerk of the diocess of Dunkeld in 1551.[3] The following clauses are added after the permission for the marriage of ten persons, so circumstanced, respectively,

[1] She was then under age.

[2] Rymer, Vol. vii. p. 765—6.

[3] Dundas Charter Chest.

of both sexes.[1] " Non obstantibus premissis, ac bone memorie Ottonis et Ottobonis olim *in regno Angliæ*, et *forsan* etiam in *dicta provincia*, apostolice sedis legatorum, et quibusuis aliis apostolicis nec non in provincialibus et synodalibus conciliis editis generalibus vel specialibus constitutionibus et ordinationibus; *necnon statutis* et *consuetudinibus regni Scotie*, et provincie, predictorum *etiam juramento, confirmatione apostolica*, vel quavis firmitate alia *roboratis*." It being doubtful how Ireland was situated in this respect, the canons both of England and Scotland are applied, though hesitatingly, to her; but there is no such ambiguity as to Scotland, which is only affected by her own statutes and customs,—while these are further declared to have been corroborated by the oath and ratification of the Pope.

How, in particular, we were saved from the encroachment of the legate Otho at the time, is explained by the following passage in Lord Hailes's Historical Memoirs concerning the Scots provincial councils. " In 1237, Henry III., King of England, and Alexander II., King of Scots, met at York. At this meeting was present Otho, the pope's legate in England, a cardinal deacon, under the title of *Sancti Nicolai in carcere Tulliano*. The legate expressed his intention of visiting Scotland, in order to regulate ecclesiastical affairs in that kingdom, as

[1] The words in the deed are " decem copulis, viz. decem viris et totidem mulieribus."

he did in England: Alexander is reported to have addressed him in the following manner: "I do not remember ever to have seen in my dominions a legate from the Pope: neither is his presence necessary with us; for hitherto the condition of our church is prosperous. The King, my father, and my other predecessors, never admitted a legate into Scotland; neither will I, while I retain my authority. You have the reputation of being a holy man, and therefore, should you visit Scotland, I counsel you to beware, for lawless and blood-thirsty savages dwell in my dominions. I myself am not able to keep them in due subjection. You may have heard how they lately made an attempt on my own person, and sought to expell me from my kingdom. Were they to assail you, my authority would not restrain them."[1]

Our native Canons, thus recognized by the Court of Rome, not only were a rule in the spiritual courts, but were solemnly enforced by the civil tribunals. The act in 1516, ratifying the divorce of Albany from Catherine Sinclair, is upon the ground "yat yai had maid (their marriage) quietly wytout ony publicatioun or solempnietis requirit yerto, aganis ye *decretis* ande *constitutiouns* of ye kirk," and "uyeris lawis, customes, and constitutiouns of *yis realme*,"[2] while a previous act in 1443 expressly enforces "the actis

[1] Ann. Vol. iii. p. 212.

[2] Acts of Parliament, Vol. ii. p. 283.

and statutis maid of befor tyme in general and provincial counsale."[1] There are, besides, other similar ratifications of the privileges and freedoms of holy kirk. It may be also observed, that in a question of executry before the official of Lothian in 1547, a party exclusively claims a preference as executor "secundum *stilum statutorum Synodalium*,"[2] which, it will be remembered, is the phrase employed in the Papal dispensation in 1529. Hence our church had a body of law applicable to consistorial questions, which was compiled in Scotland by the ordinary authorities. It appears by a judicial proceeding, 4th of February 1560, that "be the kirk mennis awin *statutis* last maid in *yair provinciall counsale* haldin at Edinburcht,"—independently of "the law of God and lovabill acts maid be the nobilitie of Scotlande "sensyne"—the payment of "corps-present or herezeld" to the church was abrogated.[3] This was the last Provincial Council in every sense, and the duty in question was a mortuary or funeral gift to the church—either the best cow or horse, &c. of the deceased—which was led before the corpse at the funeral. Some are inclined to question the authority and authenticity of our Canons, but, after finding them thus appealed to, and respected by third parties, to whose interests

[1] Acts of Parliament, Vol. ii. p. 33.

[2] Crichton *against* Stennop, 13th November 1547. Act or Diet Book of the Official of Saint Andrews.

[3] Act. Dom. Con. et Sess. Vol. xx. p. 303.

they might be detrimental, as well as a rule in practice, this may be really carrying scepticism too far. They were confirmed in Parliament as we have seen, in the fifteenth century, and, indeed, at a much earlier period, as is corroborated by an original authority that is not alluded to by Lord Hailes.[1] In a petition or remonstrance, addressed to Alexander III. by many of our Prelates, it is represented to the Prince, that although those things "quæ in ultimo concilio apud Edinbrucht celebrato, vobis et magnatibus presentibus, ordinata fuerant, minime in scripturam redacta," yet they could not believe that it escaped the memory of his counsellors, "quod ecclesie, et earum prelati omnium jurium et libertatum pacifica possessione gauderent *quæ tempore felicis memorie Regis Alexandri patris vestri optinuerunt.*"[2] This was in reference to a conceived spoliation by the laity of their elemosinary grants, without the cognizance of their own body. Now, it is remarkable that Lord Hailes has shewn that in the reign of the last mentioned monarch—in 1242, there was a Provincial Council held at Perth, where "no

[1] In his Historical Memorials concerning our Provincial Councils.

[2] Among ancient and original deeds collected by Sir James Balfour, Advocates' Library. It is without date—but, perhaps, was written in 1269, when, as Lord Hailes observes, the people and the clergy were at variance. *Hist. Mem. ut supra, Annals,* Vol. iii. p. 217. His Lordship does not notice this last Council held at Edinburgh in the reign of Alexander III.

Papal Legate appeared," and "that this Council published certain Canons *which were ratified by the King and the Estates,* and remained in observance until the abolition of popery." These were the guarantees which they obtained from him, "jurium et libertatum." The authorities he quotes are Boece and Fordun, the former of whom affirms that at the Council in question, "edita sunt statuta provincialia *approbata Rege,* et *regni proceribus.*"[1] All these intimations respectively corroborate each other, and, evidently alluding to the same act, affix the stamp of undoubted validity and authority to our Canons.

It cannot escape notice, that in the proposition and argument last referred to, of the pursuer in the action of bastardy, against Stewart of Tracquair, it is contended that a subsequent marriage upon a dispensation between parties related within the forbidden degrees does not legitimate—as in the case of a *solutus* and *soluta*—the issue previously begot.[2] Here the relationship operates as an effectual impediment in the way of the legitimation, and the

See p. 171 -2.

[1] Annals, p. 215.

[2] The facts to which he applies the law are stated as follows: "sed sic est quod dictus quondam *Willielmus (Stewart of Tracquair)* fuit genitus, et procreatus, et natus inter dictos quondam Jacobum Steward et Katherinam Ruyerfurd, *stante dicto impedimento* consanguinitatis tertii, et tertii gradus, *ante* commissionem dispensationis ad matrimonium contractum, et solemnizatum si quod fuit, Igitur ut supra ipse decernendus venit illegitimus et bastardus quoad successionem hereditariam."

conclusion is further said to be grounded upon the consuetude and practice of the kingdom. Every antiquarian will perceive that this doctrine is important, and may affect a question that excited much controversy during the course of last century. It is now proved by indisputable evidence, that Robert II. and Elizabeth Mure were within the forbidden degrees of propinquity, and had a large family, including Robert III., before they obtained the dispensation, in virtue of which they were afterwards enabled to marry. The impression that this connection left in the minds of the nation—though distorted and misrepresented—was extraordinary, and might give rise to suspicion. In the general case, the law above stated is correct, but then the dispensation of the parties (dated in 1347,) intimates that they had been *ignorant* of their relationship,[1] which circumstance, according to some, from

[1] This document was discovered by Andrew Stewart in the Vatican in 1789, who has inserted a full copy of it in his Supplement to the *History of the Stewarts*, p. 418—19. The portion here referred to is as follows,—"quod dudum, ipsis Roberto et Elizabeth *ignorantibus*, quod dicta Elizabeth, et dilecta in Christo filia *nobilis* mulier Ysabella Boutellier domicella ejusdem Diocesis, in tertio, et quarto, ac Elizabeth, et Robertus prefati in quarto consanguinitatis gradibus sibi invicem attinerent, idem Robertus dictam Ysabellam primo, et postmodum predictam Elizabeth carnaliter cognovit, et quod ipse Robertus, et Elizabeth *diu cohabitantes prolis utriusque sexus multitudinem procreaverunt.*" Here, it will be observed, that there were two legal impediments—one from Robert and Elizabeth, being with-

the *bona fides* of their parents in this respect, might place the issue in the situation of those of a *solutus* and *soluta*, and hence render them capable of legitimation by subsequent marriage. At the sametime, it was a point much agitated by high authorities, whether the plea of ignorance could here avail; and it is conceivable, that the peculiar usage and practice of Scotland, which, as has been shewn, might be at variance with that of Rome, were formerly averse to it, as indeed may be inferred from a precedent that will be noticed in the sequel.

Ludovicus de Sardis, after putting the exact case, gives us his sentiments in this manner upon the question. "Habui filios ex mihi coniuncta *quarto* gradu, *me ignorante* impedimentum eam in concubinam habui, nunc, sublato impedimento, accipio eam in uxorem, an filii ante nati legitimentur? vi-

in the fourth degrees of consanguinity,—and another, owing to Robert having carnally known Isabel, who being in the third and fourth degrees of consanguinity to Elizabeth, Robert necessarily came to be in the same degrees of *affinity* to the latter. These circumstances might render the plea of ignorance the less probable. Their case, too, appears to have been no ordinary one, for the Pope enjoins—evidently as an expiation, or in return for the favour he bestowed—that Robert should found and endow "aliquas, vel aliquam Capellanias, vel capellaniam," with which condition it can be proved he actually complied. See Mortification by Robert, 12th January 1364, ap. Hay's Vindication, p. 42. He here alludes to the permission granted by the dispensation to marry "*non obstante impedimento consanguinitatis*, et *affinitatis*."

detur quod non, quia mero jure *non potuit esse uxor tempore quo nati sunt* quod requiritur ut supra de legitimatione per verum matrimonium, § 3, q. 6.[1] In contrarium decidit glossa extra, *qui filii sint legitimi caput tanta.* Et ex hoc non singularem extensionem ad *caput ex tenore,* ubi dicitur quod si fuerit defectus in matrimonio ignorantia parentum excusat,[2] nam idem est per illam glossam si fuerit defectus in concubinatu, et postea contrahitur matrimonium."[3] It cannot be denied, while stress is laid upon Sardis' first reason, that the analogy in the last instance is striking; for if an impediment to a marriage, existing at the birth of the issue, does not deprive them of the benefit of their parents' ignorance, it may be harmless also in a case of concubinage, like that of Robert II. and Elizabeth Mure.

But, on the other hand, it has been argued that *bona fides* is not to be presumed in concubinage, because the parties *dant operam rei illicitæ,* which exception cannot apply in the previous alternative, where in fact there is, on the part of the contractors, nothing that can affect their consciences, or actually impeach their honor or morality. Abbo and

[1] He here refers to what he had previously laid down upon that subject.

[2] That is to say, if the marriage is celebrated *in facie Ecclesiæ,* it would be otherwise, if *clandestine.*

[3] *De naturalibus filiis,* ac *successione eorum. Tractat. Tractat.* Vol. viii. P. ii. p. 37. The quotation is fully given without the contractions.

Johannes Andreas lay down this distinction which the celebrated Suares thinks reasonable, " quia (secundum eos) contrahens matrimonium dat operam rei licitæ, ideo ignorantia sua excusatur, sed admittens virum sine matrimonio, dat operam rei illicitæ, ideo ignorantia sua non est probabilis, nec debet inde consequi præmium." Abbo, he observes, says that this doctrine pleased[1] Antonius de Rosellis, and was in his (Abbo's) own mind, " verissimam opinionem quia danti operam rei illicitæ imputantur omnia quæ sequuntur præter voluntatem suam." Suares then, after alluding to *c.* tua *de homici.*—Francis Zabar in *c. tanta, 2 coll.* &c., generally adds—" et sic aperte concordant omnes isti in hoc, quod si filius esset susceptus ab illa cum qua non erat matrimonium contractum, nihil prodest ignorantia impedimenti, unde requirant omnes isti matrimonium. Per hæc videtur dicendum, quod si *d. gl.* non est vera, ut isti fatentur, et aliquis habens filium ex aliqua quæ non est uxor, nec sunt matrimonio conjuncti, inter quos est impedimentum tamen ignoratum, etiamsi postea contrahat matrimonium cum ea, non legitimatur filius per subsequens matrimonium, ex eo, quia non fuit habitus in figura matrimonii, quod a fortiori sit dicendum *in eo qui habet concubinam,* et ex eo habet filium, *et ipsi sunt conjuncti et consanguinei,* vel est inter eos aliud impedimentum, quod *etiamsi ipsi vel alter eorum ignorent impedimentum filius non erit na-*

[1] Author of the treatise de *Legitimatione,* see *Tractat. Tractat. Vol.* viii. **P.** ii. p. 75.

*turalis*[1] *quia si esset naturalis, legitimaretur per subsequens matrimonium, ut in d. c. tanta.*"[2] Such doctrine and interpretation would appear conclusive, and fatal to the legitimacy of the Stewarts —and upon the whole Suares may be said to lean to this side; although he at the same time notices some opposite opinions, that seem, however, far from convincing, and bids adieu to the subject in these words,—" Cogita, et inhæreas æquiori et saniori opinioni ad salutem animæ, et conscientiæ."[3] One illustration is forcible, at least extremely plausible. If parties labouring under an impediment of which they are ignorant, contract a marriage *clandestiné*, and not in *facie ecclesie*, their ignorance avails nothing, and the issue are illegitimate, although born *in figura matrimonii*, without any imputation, as is possible, against the parents. " Quanto magis," then, exclaims Suares here, ought *bona fides* or ignorance " *in concubinatu nil prodesse.*"

We might be induced to infer from a precedent somewhat earlier,—in 1322, that with us *igno-*

[1] Naturalis, it is to be observed, in the language of writers, denotes only the bastard off-spring of a *solutus* and *soluta*—being opposed to *spurius*, which is descriptive of an incestuous or adulterous bastard, neither of whom in the general case at least, can be legimated *per subsequens matrimonium*, while the issue of the former assuredly can.

[2] Ib.

[3] *De successione, fil. nat.* et *spur*, ap. *opera Roderici Suares, Jurisconsulti celeberrimi*, p. 320.

*rantia* under even stronger circumstances, did not legitimate the offspring. Johanna Cunnynghyn (Cunningham), was related within the forbidden degrees of affinity to Adam More, but their mutual friends desiring their union, certain letters were produced which were represented to be a dispensation, upon the credit of which, Johanna, (who had before a repugnance to the step) in the belief that they were genuine, actually married him. It happened, however, that the letters were forged, a circumstance of which Adam was well aware, but Johanna being quite in a different predicament, and thus clearly in *bona fide*, we might have thought that their subsequent issue would have been legitimate, as the *bona fides* only of one party is held in law to be sufficient for the purpose. But no such thing,—it was found necessary to apply to the Holy See, who accordingly granted a dispensation—so far as it could—confirming the marriage without a previous divorce, and legitimating the children.[1] That these

[1] "*Auctoritate Apostolica, de speciali gratia—de Apostolice plenitudine potestatis.*" These expressions are here used, and the parties are allowed "in dicto matrimonio licite *remanere*;" hence it is additionally proved, that their marriage *de facto* must have been in *facie ecclesie*, and not *clandestiné*. Dispensations in general contain many high-sounding dogmas, arrogating to the Pope most extensive powers, and dwelling upon the plenitude of his authority in tempering Law, but they were not to the excess that has been represented, or viewed in the same light by third parties. There were besides different degrees of legitimations

besides were accounted spurious, would follow from this inductive motive in the dispensation. "Nos itaque attendentes quod viri scientia atque culpa tibi, prefata Johanna, quæ in hac parte probabili deceptum errore te asseris, non debet in tuum, et liberorum tuorum *prejudicium*, et *dedecus* redundare," &c. It is very clear if Johanna's ignorance, or *bona fides*, had made the issue lawful, no prejudice or *dishonour*—and evidently inferring illegitimacy—as

—some only to admit a party to holy orders, and his ability to legitimate *quoad secularia*, while he might do so *quoad sacra*, was not allowed in foreign countries. Indeed, in the instance of Fleming, to be afterwards noticed, the parties did not rely upon a Papal legitimation, but expressly obtained one for their offspring from the crown. Our sovereigns were extremely jealous of any Papal interference, so far as regarded their secular or ordinary rights, as is proved by our Acts of Parliament, and other unexceptionable authorities. In the preceding case, according to proper practice, Adam and Johanna ought to have been divorced, and then re-married after obtaining the dispensation. In the case of Tracquair it was relevantly, maintained that notwithstanding the commission to dispense with an incestuous impediment between James Stewart of Tracquair, and Katherine Rutherford, (who had married) their issue, nevertheless were illegitimate, "inspecto tenore hujusmodi commissionis ordinando dictatos quondam Jacobum et Katherinam *divortiari*, et *de novo postea matrimonium contrahere*, et in facie ecclesie solemnizare, sed sic est quod dictus quondam Jacobus, et dicta quondam Katherinæ post datam Commissionis ad dispensandum numquam fuerint divortiati, et postea matrimonio in facie ecclesie copulati, sive matrimonium inter se contraxerunt, quare sequitur dictum quondam Willielmum genitum sive ante, sive post hujusmodi commissionem ad dispensandum, illegitimum et bastardum fuisse."

here stated, would have attached to them,—as little indeed might it have affected herself, for by our later practice, when the plea of ignorance was received, the mother in such a situation was duly provided out of the estate of the father, and even on some occasions retained his title. Thus it can be proved that Elizabeth Home, the first wife of James second Lord Hamilton long after their divorce, was styled Lady Hamilton; and Beatrix Drummond, his second spouse, who was also in the same predicament, received the title of Lady Mauchanshire, from that ancient portion of the Hamilton estate that was settled upon her.[1] The previous part of

[1] It was by Janet Beton, the third wife of this fickle nobleman, that he had the Regent Chastelherault his heir. All these wives were alive at the same time.

In the same way, Agnes Sinclair, (daughter of Lord Sinclair) the mother of the infamous Bothwell, after her divorce from Patrick Earl of Bothwell, his father, is styled alternately Countess of Bothwell and "the Lady of Moreham," which portion of his estate was settled upon her. The former is represented to have mentioned the fact to Mary, of his having succeeded to all his father's titles and estates, notwithstanding the divorce, with the view of justifying the similar step that he adopted with respect to his own wife, preparatory to his marriage with the Queen. The will of "dame Agnes Sinclair, Countess of Bothwell, and Lady of Moreham," dated 21st March 1572 is to be found in the Testamentary Record of the Commissary Court of Edinburgh. She there makes Jane Hepburn Maistres of Caithness her daughter, who is well-known, her only executrix; and leaves "hir haill gudis," after payment of her debts "to *Williame Hepburne sone natural to James erle Bothwell.*" This is the

the dispensation, also shews that the fact of the deception, did not rest merely upon Johanna's allegation, for it expressly says "quibus literis (the fictitious ones) tu prefata Johanna *tuique consanguinei et amici fidem plenariam prebuistis.*" Hence she is fully proved to have been *in bona fide;* and this, as has been observed, is a more favourable case than that of Stewart, because the children were not born in concubinage or fornication, but in *figura matrimonii*, as it was termed, that is, in marriage *de facto* —a distinction that has already been commented upon We are also indebted to the acute Andrew Stuart for a full copy of the above dispensation, as well as for some others which he obtained in the Vatican, while prosecuting his inquiries into the History of the Stuarts.[1]

There can be no doubt, however, that *ignorantia* with us did legitimate the issue of an unlawful marriage, at least before the middle of the sixteenth century. In 1541 and 1542, William Quhite and Isabel Ewinstone, James Mowbray and Margaret Smyth, are divorced on account of affinity, but the children of the respective parties are decerned to be lawful, upon the sole ground of William and James having been ignorant of the impediment.[2] This

only offspring that is imputed to that singular personage. What became of William does not appear.

[1] See Supp. to Hist. Stewarts, p. 428.

[2] Decreet Book of the Official of Saint Andrews within the Archdeaconry of Lothian, under the dates 10th March 1541 and 19th February 1454.

also confirms a previous remark, as to the ignorance of only one of the spouses being sufficient for the plea. *Scientia* and *ignorantia*, are directly opposed to each other in the Tracquair litigation formerly alluded to, with the usual results; and, as might naturally be expected, the reformation in this respect made no difference, however the prohibitions against marriages, within the remoter degrees of consanguinity and affinity, came to be abrogated. In the action of bastardy that has also been noticed, in 1573 by Alison Dunbar (with concurrence of her husband) against her niece Christian Adair, the former, who was the successful party, after shewing that there was a legal impediment, from a *previous marriage*, to that of her sister, Janet Dunbar, with William Adair, Christian's parents,—contended that their issue, and necessarily Christian, " man be bastardes in caise nather of ye saidis personis had bene ignorant of ye said impediment preceiding—and yerfoir the chief point of ye question standis quhider gif ye saidis personis, or *ather* of thame was ignorant yerof, and in *bona fide*, quhilk ignorance, or *bona fides man infer the said legitimation*, or ellis the samin cannot be concludit." We further gain, from this case, some original insight into what ignorance was legally held to be, for it is argued by Alison, that the deceased Janet Dunbar " yat ane of ye saidis parties can not be judgeit ignorant of ye foirsaid impediment, becaus the same is groundit upon her awin deid, and as to the said

William Adair, he, nor na person discending from him, may be hard to allege his ignorance, because he the tyme of ye said last allegit meriage, perfatlie knew the said former impediment, in sa fer as ye said first impediment and wedding, quhilk ye said Alison and hir spouse offereit yame to preve sufficientlie, wyt ye said mutuall intertenement, procreation of children, ande reputation of the saidis personis as mereit folkis was than, and be the space of tua, or three yeiris preceding notourlie knawin, divulgeit, and publiest in the haile parochin of Mochrume by common voice and publict fame, in the quhilks the said umquhile Williame Mundale,[1] Janet Dunbar, and William Adair, duelt all that tyme, quhairfore *in re publica nota, cujus etiam erat promulgata fama vicinie,* the saide William Adair can not be hard to pretend ignorance becaus in yat he suld be herd to allege *latissimam culpam, imo dolum, et turpitudinem suam, quod est nescire illud quod omnes intelligunt,* but becaus *scientia* or knowledge *est internus habitus* thair can nai witnesse directlie preve *assignando scientie causam,* that any man knowis, or misknowis, and yat yerfoir the law havand respect quhat *externall* deidis may convict ony personis of knawledge hes statute and ordaint ane certain probation quhilk necessarlie may convict ony persone of knawlege incaise yai wald pretend ony ignorance,

[1] Janet's husband by the previous marriage, that formed the impediment.

and yat be thre manner of wayis, the first quhen the person quha wald pretend ignorance is present at ye deid, the secund quhan he is certifeit yerof at his dwelling place, and the third quhen the deid is notowrlie divulgeat ande knawin to the countrey as in yis caise, quhilkis thre maneris of probation of knawlege ar esteemit concludit, ande decydit be the hale doctouris wytout difference to be of ye alyk veritie, ande are callit *liquidissime*, as sal be mair cleirlie specifeit in ye informationes gif neid be, and yerfoir ye saide Williame Adair, nor na uyer foundand yer defenses upon ye saide allegit ignorance may be hard yerin mair nor gif he had bene present at ye saide first marriage, &c.—yea the said Williame be the notorietie of ye deid is convict of knawledge *presumptione juris*, et *de jure, contra quam non recipitur probatio, albeit he had bene ignorant yerof*, as he wes not, and trew it is yat ye law makand the barnis lauchfull *propter ignorantiam impedimenti et bonam fidem* is not extendit to fraudful, grose, and effectual ignorance, but is restrectit ad *probabiles ignorantias*," &c. It is further added, that owing to this circumstance " none of thame can be hard to pretend ignorance yairoff *cum par sit scire et scire debere*."

[1] Alison who, upon these grounds, prevailed in the action, and her unfortunate sister, it may be here added, were heirs-portioners of their brother, Andrew Dunbar of Loch, or Mochrum Loch, indisputably the heir male, and direct representative of the once mighty Dunbars, Earls of March, Lords of Man, Annan-

The *Regiam Majestatem* affirms that none can be a lawful heir, " qui ex legitimo matrimonio *non*

dale, &c. The Janet mentioned in the text, however dissolute, (as further, indeed, appears from the litigation) only followed the footsteps of her sister Margaret, who, on the 25th of May 1568, was divorced by her husband, " John Wemis, sone to David Wemis of Clair," for adultery with a person called John Gifford at Kirkyat, whom she afterwards espoused. This Margaret, in a contract in 1574, is styled " *eldast* sister, and ane of ye airis of umquhile Andro Dunbar of Loch and Kilconquhar, hir bruther;" and there can be no doubt that, in this degraded line, so meanly married—supposing Margaret to have left lawful issue, which may be doubtful in every view—must now centre the senior and direct representation of confessedly the noblest and most ancient family in Scotland. Every one is familiar with that illustrious traitor, George Earl of March, their representative in his day, who, in consequence of an affront which must ever excite commiseration, adopted the interests of Henry IV., and by his efforts at the battle of Shrewsbury, where he foiled both Percy and Douglass, may be said to have secured the crown to Henry; for which the latter made but a poor return. Whether by the favor of that Prince, or according to a custom that is to be traced in Scotland towards the end of the same century, in the case of some of our first families, the Earl had a pursuivant, or herald, who bore the proud designation of " Shrewsbury"—evidently in commemoration of his deserts upon the above occasion. In Scotland, however, the epithet of the herald, or *signifer*, as he was also styled, was derived from a principal residence; thus we have *signifer Slains*, or *Hailes*, who were subservient in that capacity to the Earl of Errol, and Lord Hailes. The treason of Earl George was never, in fact, forgiven, although all the consequences of it were visited upon his unoffending heir, who, after having in vain attempted to interest the English monarch in his favor, retired to Scotland, where, for a period a small pension, as

Act & Dec. Book Com. Court of Edinburgh.

Rec. Bonds and Ob. for that year.

See Rot. Scot. Vol. ii. p. 167.

Rymer, Vol. x. p. 618-28-9.

est,"[1] and that a person born "*antequam* Pater matrem ejus desponsaverat—secundum jus et consuetudinem Regni *nullomodo* in hæreditatem tanquam hæres sustineri potest."[2] It is, however, notorious that this compilation derives its origin in England, where such doctrine exclusively holds, and from its peculiar character and texture, cannot be received as a proper authority in any controverted point. Indeed, it is often very difficult to know how to deal with the *Regiam*. It no doubt is appealed to in Acts of Parliament, and in questions before the Supreme Civil Court; but, on the other hand, if we adopt it as a rule, we will be completely misled in matters of essential importance. The author shewed this in a late publication,[3] and he will here add another illustration to the same effect. John Comyn Earl of Buchan, Justiciary of Scotland in the time of Edward I. maintained his right, agreeably to the law and usage of Scotland, to the person and lands of Rauf de Lasceles an ideot, his vassal, in his capacity of over-

can be proved, was bestowed upon him. In the meantime, the family sunk to the comparatively low degree of Lairds of Kilconquhar and Loch, and at length reached the climax of degradation, in the persons of the co-heirs in the text, whose only merit consisted in their tendency to illustrate the law in the Commissary Court by their disreputable conduct. Lindsay, in the Papingo, moralizes upon the striking catastrophe of this race.

[1] Lib. II. ch. 50, § 1. [2] Ib. ch. 51, § 1,—3.

[3] Remarks upon Scottish Peerage Law, &c. p. 52–3, *note*.

lord and superior.[1] But the *Regiam*, in opposition to this, generally inculcates, without any exception, that "Dominus Rex habebit custodiam terrarum et tenementorum *fatuorum* naturalium, capiendo exitus sine vasto et distinctione—Et de *quocunque feudo* fuerit terra illa, post mortem eorundem redeat terra rectis hæredibus."[2]

Erskine is very unhappy in the instance, in his Institutes, of John Lord Fleming and Margaret Stewart, by which he seeks to instruct his assertion, "that legitimation *per subsequens matrimonium*, was rejected by the ancient law of Scotland,"[3] thus at once bastardizing the entire royal line of the Stewarts. In support of the conclusion, neither he nor Father Hay, to whom he appeals, adduce any thing conclusive. The above parties, aware of an incestuous impediment to their marriage, had sent to Rome for a dispensation, and the authority to which Erskine refers—a charter in 1508, of the Baronies of Thankerton and Biggar in their favour—specially *legitimates* the offspring (whom it styles *Bastards*) that might chance to be born *before* its arrival, and celebration of their marriage in *facie Ecclesie*.[4]—This

[1] Rolls of Parliament, Vol. i. p. 47.

[2] Lib. II. ch. 46.

[3] Appendix, No. II.—See also Book i. tit. i. § 35.

[4] "Insuper si contingat aliquos filios et proles masculos—inter ipsos Johannem et Margaretam procreari, *antequam* legitima dispensatio matrimonii inter eosdem ad istas partes a curia Romana

never can be held a proper case of legitimation, *per subsequens matrimonium*, which pre-supposes no such obstacle, but, on the other hand, directly con-

devenerit, et desuper executum fuerit, et ante complementum matrimonii in faciem ecclesie, &c. nos ex nostris gratia, et favore, specialibus, &c. dedimus—dicto filio, et filiis—liberam facultatem, &c. ut ipsi et eorum aliquis libere et licite disponere valeant, &c. de omnibus et singulis terris suis, &c. non obstante quod si contingat ipsos *bastardos* procreari, et privilegiis juris nobis super eschætis *bastardorum* concessis." The lands, it may be observed, are only taken to the disponee, and the heirs-male of his body.

These individuals after married, as is proved by an infeftment in the Cumbernauld Charter chest, 5th February 1511, granted by John Lord Fleming to Janet Calderwood,—" de consensu, et assensu nobilis domine Margerete Stewart *sponse* dicti Domini Fleming." Their union, however, was not of long duration, for there is in the same Repository a divorce, dated 25th of October 1515, between John Lord Fleming and Margaret Stewart, because, *previous* to their marriage (which was contracted, " *per verba de presenti, carnali copula subsecuta, in facie Ecclesie,*") James Lindsay " *consanguineus* dicti Johannis Domini Fleming" had carnally known the said Margaret—which James and the above nobleman were in the second, and second degrees of consanguinity and affinity. Lord John, therefore, and Margaret, were in the forbidden degrees of affinity before the marriage, which necessarily voided it. In all probability, the dispensation from Rome had not been obtained, or if so, not resorted to. This unfortunate, though somewhat mysterious Lady, who is also adjudged by the above sentence to refund her dowry, was probably another wretched victim to the profligacy and libertinism of the age, because there is, at this time, an action at her instance against her husband for " ye wrangwise ande *maisterful* seduceyng, ande *compelling*, ande distrenzeing of ye said Mergreit

firms what has been remarked as to the inefficacy of a dispensation and marriage between persons within the forbidden degrees, without at least the plea of ignorance, to legitimate their previous issue. It need hardly be observed, that the contemplated offspring of Lord Fleming and the lady were obviously spurious at common law, and are only legitimated

to *propone ane cause of divorce between hir*, and ye saide John Lorde Flemyng, and ye seduceyng of ye said Mergret, ande geving of fair wordis to hir causing hir to resigne in my lorde governoris handis his landis of biggar and thankerton, *and to heir the saide divorce of nane avail.*" *Act. Dom. Con.* Vol. xxvii. f. p. 176. From this it would appear that her spouse forced her to publish her shame, in order to deprive her of those lands which had actually been settled upon her in contemplation of their marriage by the charter in 1508, that has been alluded to. The noble lady in question is proved by the same deed to have been daughter of Matthew Earl of Lennox, and respecting her there is this seemingly inexplicable proceeding in the Record of our supreme civil Court in 1508. "The Lords commandit matho erle of levenax and all his folkis, ande Johne lorde Flemyng ande all his folkis, yat nane of yaim tak upone hand to cum to commone wyt..... Stewart daughter to my lorde of levenax, *now in kepin wyt ye Provest of Edinburghe*, or persew quhar scho is, *under ye pain of deid*, quhill oure soverane lorde provide ane way for ye delivering of hir to yaim, yat scho sulde be deliverit to, and yerupone ye saide erle askit ane not—*Hora quinta*, the said Erle protested yat yis pain may be execute upone ya personis yat dois incontrare yis ordinance. The Provest of Edinbruche protestis yat ye sulde stand under na danger of *ye kepin of yis*... Stewart, sen he did it bot at ye lordis request for twa das, quhill yai addrest ye King." *Act. Dom. Con.* Vol. xx. p. 115.

*secundum quid*, per *rescriptum principis*. Thus it actually turns out, that the legitimacy of the Stewarts can be alone saved by the alleged ignorance of their ancestors, Robert II. and Elizabeth Mure, of an incestuous intercourse, that continued for a lengthened time, during which, to use the words of the dispensation, they procreated a multitude of children. How far this may be likely, under the particular circumstances, not forgetting Robert's intercourse with the *noble* Boutellier, Elizabeth's cousin, which rendered their connection doubly incestuous, and of which he naturally should have been aware, or reconcileable with the legal requisites in the case of Adair—especially the maxim *par sit scire, et scire debere*, &c.—may possibly afford room for discussion. According, at least, to the doctrine upon that occasion, probable and not actual belief of an impediment, or what might be inferred from external indications, without prying deeply into the secret, or into the breasts of the parties, which indeed is impossible, fell to exclude it.

The abstract import of the Papal dispensation in 1347, as capable of obviating an irreparable defect, or rather as equivalent to an Act of Parliament in our days, need not be descanted upon; for the power of the Pope in this respect was denied, and might naturally, as is evident, have been resisted in Scotland, while it never has been admitted that he could control the succession to a kingdom by an arbitrary legitimation; he might legitimate as he

chose *quoad secularia* within his own dominions, but not certainly in foreign countries. Whatever there is in the above remarks, it may be only added, what must be familiar to every lawyer, that in matters of doubt the law usually leans to the side of legitimacy, and having shewn what appear to be the leading characteristics of this case—avoiding as much as possible all unnecessary comments, it may be now fairly left to the judgment and discretion of the reader.

By his second wife Eupheme Ross, daughter of the Earl of Ross, Robert II. had two sons, David and Walter, against whose legitimacy there could be no imputation, being both born after the regular and unexceptionable marriage of their parents; and it is very clear, supposing the *status* of the first family to be doubtful, that they were the individuals directly interested in questioning and challenging it. As if to preclude all kind of dispute after his death, the same Monarch executed a settlement of the Crown in 1373, which was ratified by Parliament—entailing it upon the sons of the first marriage *nominatim*, and the heirs-male of their bodies respectively, with remainder in the same way to the sons of the second, thus giving the preference exclusively to the male line,—failing whom, the heirs whatsoever, necessarily embracing females, were alone entitled to succeed.[1]

[1] Original among the Public Muniments of the Kingdom, in the General Register House.

Mr. Tytler is unaware of this transaction, when he asserts that the recognition of Robert II. and his eldest son[1] merely, by the states of the realm in 1371, constituted "*the charter* by which *the house of Stewart long* held their title to the Crown."[2] On the other hand, there can be no doubt that the former was the regulating act of settlement, under which the subsequent Stewarts exclusively derived their right. This, indeed, is evident, not only from the act 1373 being the latest, but because that of the recognition in 1371 stops short at Robert III. and his son, without adding who were afterwards to succeed. It was thus only an inchoate, or imperfect deed, being spent, and at an end after the death of the latter princes; and besides, it is clear that before 1373, the succession was not fully established, as a motive for passing the settlement in that year appears from the preamble to have been "*incertitudinem* successionis vitare."

Towards the close of the reign of James I. the male issue of Robert II. and Elizabeth Mure had totally failed, with the exception of James and his only son; and, as David, the eldest son of the second marriage, had also predeceased, leaving only a daughter, Walter, his next brother, who was then alive, became, in this manner, heir to the crown, failing the two former. There was *independently a leaning to the male descent* in the royal succession, which had

[1] *Nominatim* it is to be kept in view.

[2] Hist. Vol. iii. p. 4.

even been adopted by Bruce,[1] that rendered his position still more imposing. This person was no other than the notorious Earl of Athol; and many writers assert that the conspiracy of which he was the author, and which proved fatal to James, was in consequence of the right he conceived he had to the crown, owing to the supposed bastardy of the line of Elizabeth Mure.[2]

[1] Declaration of Parliament as to the succession of the crown in 1314, where, failing heirs-male of the body of Robert Bruce, it goes directly—passing over his daughters—to Edward his brother, and the heirs-male of his body. *See Robertson's Index, Appendix*, p. 7.

[2] Bishop Lesly, though a warm adherent of Queen Mary, nevertheless avers that the "exhæredatio" of Eupheme Ross's children, by the Act of Settlement of the crown, in the first instance upon Elizabeth Mure's issue, "magni odii inter liberos, fomite subministrato, necis Jacobi primi ab Eufemiæ filio natu maximo editæ, causa fuit." Walter, it may be observed, was her eldest and only son at that period. *Hist. Edit.* 1575, *p.* 249. Godscroft is positive upon the point, he says that the murder was "at the instigation of Walter Stewart Earl of Athol—who pretended to be rightful heir to the crown, and that he was wronged and defrauded by the son of Elizabeth Moor, who was only a concubine as he alleged." *Hist. of the Douglasses, Vol. i. p.* 257. Drummond of Hawthornden, a decided partizan of the Stewarts, states, that "he who gave motion to all, was the Earl of Athol himself, the king's father's brother, whose quarrel was no less than a pretended title and claim to the crown." Edit. 1687, p. 423. In a MS. in the British Museum, written not long after the middle of the sixteenth century, containing the pedigrees and arms of the Scottish Peers, there is a retrospective notice of "Walter Stewart, Earl of Athol, soune to King Robert the Secund on his

It was he, and not Robert Graham, a rash and furious person, and obviously his tool, who devised it. Crafty and prudent, Athol first waited for the fall of the Albanys,[1] whose fate he is stated to have sealed by

first weif Eufame, who ever by reason he was the eldest pretendend right to the crowne, conspired the slaughter of James the First, and so slayne and attaynted." Buchanan and other writers fully coincide in these statements. The very punishment of Athol at his execution, serves as an illustration, when a mock crown was put upon his head in allusion to his pretensions. It is very true that the preceding authorities erroneously hold Eupheme Ross to have been the *first* wife, and the issue of Elizabeth Mure to have been born in concubinage, before Eupheme's marriage;—which was thus another impediment, and only attempted to be legitimated by a subsequent one between Robert and their mother, after the death of the other lady—but we find many historical facts, of authenticity in the main, misrepresented in this way, and made much worse than the reality, a tendency common in the minds of the vulgar. The striking circumstance—however overlooked in modern times,—confessedly is the strong and perpetual tradition, even when it was treason to whisper such a thing, of bastardy attaching to the link in question, which seemingly could not have arisen without some foundation, and, as already evident, may receive countenance from the facts and inferences that are submitted.

[1] Bower, actually a cotemporary, says, "*Hanc infortunabilem mortem (that of James I.)* ut dicitur, regi intulit patruus suus comes Atholiæ inveteratus dierum malarum, qui latenter, ut dicitur, aspirabat ad regni apicem nanciscendum. Propter quod, ut postea ad notitiam devenit, auctor et instinctor fuit ac consiliarius præcipuus ad perdendum ducem Rothsaiæ, necnon Ducem Albaniæ Murdacum, et ejus binos filios. Qui ipso Comiti, vita Comite, si sors sustineret de jure regno præficerentur. *Ipse enim* ut confessum est, *instruxit* nepotem suum Robertum Stewart,

representations to James—with whom he artfully ingratiated himself—and gradually accumulating riches and honours, he was well fitted at the time of the design to profit by the event, if the popularity of the latter had not made it recoil upon himself.

The behaviour of the Master of Athol, his grandson and heir, on the night of James's assassination, as we learn from an ancient chronicle, was curious. It states, that, co-operating with Graham, "*secum* usque lie Inche *prope* venit, et tunc penituit retrocessit."[1] Athol, like the perfidious Lovat in 1745,

et *Robertum Graham*, cum nullis aliis complicibus *ad ipsum regem sicarie occidendum.*" *Scotichronic.* Vol. ii. p. 503, *Edit. Goodall.* Elizabeth Mure's children, it may be here observed, being called *nominatim* by the act of settlement to the crown, *might* thus have succeeded, even if undoubted bastards. In a MS. copy of the Scotichronicon not printed, in the Advocates' Library, Athol, who was accessory too, it seems, to Rothsay's murder,—is further stigmatized as "ille serpens ambiguus—qui a longo tempore ad coronam aspirabat,"—and as "*nutrix totius* proditorie traditionis." Major adds that Athol "sic induxit *(Graham)* ad hoc facinus perpetrandum—*ita quod de ipso perciperetur nihil.*" *Edit.* 1740, p. 307. See also the concurring authorities of Lesly, p. 265. Godscroft *(Hist. Doug.)* Vol. i. p. 257, and other historians. Monstrelet, a cotemporary, explicitly states, that "the leader (of the conspiracy)—was the Earl of Athol," who "*as principal*, although uncle to the king, had his belly cut open,"—(*when executed.*) He also says that Sir Robert Stewart, his grandson, who was hung on a gibbet, had been "very active in the business."

[1] The same referred to at p. 71, *note*, in the Advocate's Library, apparently written about four centuries ago. It further says, that Graham acted "*auxilio* Roberti Magistri Atholie."

who was equally artful—and agreeably to an old Scottish practice—keeping wholly out of view. The Master in this manner actually escorted Graham to the Inch of Perth—the classical scene of Scottish treason—and afterwards illustrated by the Gowery conspiracy;—but, availing himself of the darkness, prudently withdrew, in order, in case of miscarriage, to shift the blame from himself to his associate. As for his pretended repentance, it was probably a gloss attempted to be put upon his conduct at his subsequent trial and conviction.

By the death of James V., and of his cousin the Duke of Albany shortly before,[1] (who would, even by the Act of Settlement, have excluded Queen Mary,) the entire male issue of Robert II. failed, and the

[1] The precise date of this occurrence is proved by the following entry in the Obituary of the Chapel of *Vic le Comte*, which existed in France before the Revolution,—"Item l'obit de tres haut Prince Jean Duc d'Albanie, Comte de Boulogne, et d'Auvergne, qui trespassa en son chasteau de Mirefleur le second jour de Juin l'an mil cinqcens trente six, et fut ensevely en sa sainte Chapelle du Palais de Vic le Comte, que Dieu absolve son ame." The Palace here mentioned he possessed in right of his wife, the eldest co-heiress of the Counts of Boulogne and Auvergne; and after their deaths these noble fiefs devolved upon Catherine de Medicis the daughter of the youngest co-heiress. Albany by his wife had three children, two of whom died infants, and the other named John at a very tender age. The Author had intended to have subjoined some original particulars about the Prince and his father Alexander, the brother of James III., but he is unavoidably prevented by want of room at present.

succession to the Crown was restored, in terms of the last substitution, to his heirs at law; viz. "*veri et legitimi heredes de sanguine et parentela regali*," under which character the Princess succeeded. At the same time, the heirs, in that capacity, of Robert II., by his second marriage, were the Earls of Menteith, lineal descendants of David the eldest son of the connection, through his daughter, whose representative, as is well known, in the reign of Charles I., maintained pretensions that alarmed that Monarch,[1] and finally ended in his downfall and ruin.

See same act in 1373.

[1] William Earl of Menteith, Justice General of Scotland, President of the Council, &c.—Charles I. in a letter, 10th May 1633, informs his ministers, upon the authority of Sir James Skene, the President of the Court of Session, who pledged himself to prove the charge, that the Earl "affirmed that *he should have beine King of Scotland*, and that it was said to *him*, (*the king*,) that he affirmed to have *better*, or as good right to the crown as we ourselfis." *Original State Register of Secretary Alexander, first Earl of Stirling, including the Official Correspondence in the reign of Charles I., &c. &c. Advocates' Library.* The anxiety his Majesty betrays to efface all vestige of the services which this nobleman obtained as heir of line of the above David Earl of Strathern, eldest son of Eupheme Ross, after unjustifiably and illegally reducing them, is peculiarly striking. This appears from the valuable Record referred to, which, besides, contains other particulars about the transaction. Charles, on the 23d of April 1633, writes to the officers of State, that it "is thoght fitt for oure further securitie" that these services "be cancellat, ande deleit, to which purposis we have written to our advocat." On that very day, he presses the advocate to "prosecute the cancelling of the writtis and warrandis yerof—and that

It has been shewn, that the act of putting the offspring under "the cairclaith," obtained in the instances which have been cited of legimation ex subsequenti matrimonio; and there can be little doubt
See p. 170. that it was perpetually observed. Before the reformation, we were addicted to forms and ceremonials

youe sie the same to be deleit and raised out of the registeris,"—adding in an autograph postscript, "this I most have principallie performed." At the same time, as is proved by a letter of the King to the Clerk Register on the 24th of the month, the paper in his custody containing the opinions of the advocate, Mr. Andrew Ayton, Mr. Thomas Nicolson, and Mr. Lues Stewart, concerning "the cancelling of the services and retours," is itself to be cancelled, with the exception of their subscriptions, which are to be delivered to them, while the copies sent them by the clerk register are to be recovered and also cancelled. But alarm still continued to haunt the mind of his Majesty, for in a letter on the 8th October 1633, he urges the Chancellor to confer with Lord Tracquair, and "certifie us of youre opinion notourlie, how to *annihilat* the said service," to prevent such a thing in future, and to "*abolish* the memorie of the error past in this service." A commission had been appointed to try the Earl for his treasonable speeches, of which "we fand sufficient proof,—and in regard lykwayes, he, by his awin acknowledgement, *confessit* in effect as much."—Such are the words of Charles in another letter, dated 6th October 1633, ordering him to be confined, while he deprives him of his places of Justice General, President of Council, and Lord of Session. The general impression too, that he had been guilty, actually prevailed, as can be otherwise instructed.

The direct representative, it may be added, of the ill-fated Earl of Menteith, and necessarily of the line of Strathern, is the present Mr. Barclay Allardice of Ury.

of all kinds,—in cases of penance, expiations for murder, and crimes,—not to allude to those of a jocular and playful nature, during certain festivals in the course of the year. A good deal of fancy, taste, and solemnity was displayed upon these occasions, particularly in acts of penance performed in church, or at a pilgrimage; and the submission and homage publicly rendered to the friends of a murdered party by the assassin.

Even the amends awarded in *actionibus injuriarum*, between female wranglers in the *Cowgate*, (*via vaccaria*,) of Edinburgh, are striking; these were made at some sacred spot near the image of a Saint, or at a well dedicated to one, independently of the cross or market place, and church of St. Giles, reserved for the higher orders of this class, which in a manner is illustrated by such acts.[1]

[1] In 1543, an act of penance is ordered to be performed at the fountain of Saint Michael "in via vaccaria, vulgo at Sanct Michaellis well in ye cowgait, in publica placea." In 1525 a woman, as a punishment for scandal and defamation, is to appear in the church of Saint Giles on a Sunday, and on her knees, with her head bare, during high mass, to ask pardon of the offended party, before the altar, "domine nostre de pietate." Wax and lighted candles were also offered at such places. Women at this period were almost always the culprits, while the unfortunate husbands are called for their interests. The scenes of their contrition, independently of the above, are the Abbey of Holyrood, the cross of Edinburgh, "ye breid mercat,"—even the street opposite "lie lukin buthis,"—and on one occasion "venella que

On the occasion of marriages,—so different then in the mode of their celebration,—much more gallantry was displayed than at present; and we cannot here omit mention of the Morningaba, or gift presented by the husband to the bride, independently of the dowry, on the day of their nuptials. It is commonly rendered in Latin *matutinale donum*, although not always presented in the morning. An act of Parliament in 1503, ratifies "ye donation and gift of *oure soverane lady*, (*Margaret of England*,) ye qwenis drowry, and *morwyngift*."[1] And the civil court, in 1546, decerned James Wood, son and heir of the deceased William Wood of Bonyton, to restore to Katherine Scott, William's widow, her dwelling place and lands of Fyndlarig, &c. which had been given to her in liferent, "be ye said umquhile Williame, hir spouse, at ye contracting of meriage betwix yaim, for hir dowry, ande *mornyng gift*," along with certain valuable articles and plenishing.[2]

In 1542, Agnes Anstruther, the wife of John Betoun, younger of Balfour, pursues David Howison,

dicitur ye auld provestis close." *Register of the Official of Saint Andrews, within the Arch-deaconry of Lothian.* The pillar of repentance within the kirk of Leith, is proved, by the Edinburgh Commissary Records, to have been another place of atonement.

[1] Acts of Parliament, Vol. ii. p. 240.

[2] "Ane small chenze of gold wyt ane tabulat yerat contenand four unces—and hingar of gold wyt ane *sefhir* (saphire) stane —twelf ringis of gold wyt preciouse stainis lik as dyamontis,

the husband of the deceased Marjory Anstruther, for the following legacies, left to her by the latter,—a golden marriage ring,—a rose noble "eidem quondam Marjoriæ per dictum David ad fores ecclesiæ in lie drowry donatum"—and a hundred pound weight of flax, valued at "septem petras cum dimedia, vel saltem decem solidos *dicte* monete (*scotie*) pro qualibet petra hujusmodi, tanquam pretium et valorem eorundem, dicte quondam merjorie per prefatum Davidem *ad fores ecclesiæ in lie mornyng gift* promissis."[1] These articles were held to be the absolute property of the spouse, and her husband is accordingly decerned by the official of St. Andrews to deliver them to the pursuer.[1] The morning gift was thus, agreeably to the tendency of the age, presented ceremoniously at the door of the church where the marriage was celebrated. The fashion was universal, and applied to all ranks of society who had the means of complying with it. The last instance that can be discovered of the usage, is in the case of James VI., who gave Ann of Denmark, his Queen, the Lordship of Dunfermling in morning-gift. It was of ancient Longobardic origin, and at one time embraced the fourth part of the goods of the hus-

rubeis, turkassis, amorentis, sapheris, and uyeris, ane goune of tanny welvett lynit wyt armeyn—silver spunes," &c. &c. The extravagance of our ancestors before the reformation in dress and household articles, was remarkable. *Act Dom. Con.* et *Sess.* Vol. xxi. p 121.

[1] Decreet Book of the Official of Saint Andrews.

band, either in his possession on the day of the nuptials, or afterwards.

Nearly all these rites and customs, which, with others, indicate the lively and gallant temper of the nation, perhaps imparted to them by their French friends, vanished after the reformation;—"a change came over the spirit" of the times, and to the open profligacy characteristic of the previous epoch, succeeded a grave and ascetic disposition, tinged with all the austerity of the reformed religion, not unmixed, however, with a tolerable portion of hypocrisy.

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A transcript of Fordun in the Advocates' Library, after stating that Robert II., subsequently married "*primam amicam* Elizabetham, viz. de Mure," curiously adds, that their first son thus succeeded "*quia* a quibusdam, *dictus Comes* Atholie *(Walter)* proditor, dubitatur *non esse filius regis sed de adulterio conquestus.*" In this manner it is also attempted to explain the reason of the exclusion of the latter from the Crown after the mode resorted to by certain usurpers, and especially by Henry IV., who is represented to have aspersed the descent of Richard II., the more effectually to dethrone him. Some zealots of the Stewarts have idly fancied, that the issue of Robert II. and Elizabeth Mure were not born in concubinage, but of a marriage in Scotland previous to the dispensation.

It is almost a waste of time to notice such a conceit, which can be so easily refuted,[1] even, indeed, by the tenor of that document, as is evident from the following excerpt:—"Quod ipse Robertus, et Elizabeth *diu cohabitantes* prolis utriusque sexûs multitudinem procrearunt. Cum autem, sicut eadem petitio[2] subjungebat, proles hujusmodi sic sit in universorum aspectibus gratiosa, quod ex ea carissimo in Christo filio nostro David Regi Scotie illustri, cujus dictus Robertus nepos existit, et ipsius Regis regno Scotie subsidia non modica sperantur verisimiliter profutura, nobis pro parte ipsorum Roberti et Elizabeth extitit humiliter supplicatum, ut cum idem Robertus et Elizabeth *desiderent, in vicem matrimonialiter copulari,* et hujusmodi desiderium *nequeant absque dispensatione Apostolica adimplere,* providere eis super hoc de oportune dispensationis beneficio, de benignitate Apostolica dignaremur."

In every dispensation, it need not be observed that, when there has been a previous marriage *de facto,* and the children necessarily born *in figura matrimonii,* which, as has been shewn, was of considerable importance—the circumstance is carefully mentioned.

[1] Fordun, whom they quote, expressly says, that all the children were born "*extra matrimonium.*" Lib. xi. c. 13. See also Lesly, p. 249. Edit. 1575, &c. &c.

[2] The previous petition of the parties to the Pope for the dispensation.

# ADDENDA.

Pp. 46—7.—In further corroboration of what is here observed, as to individuals of the name of *Warde* having been about the person of the King, we find an express allusion, in 1400, "Nicholaio Warde, *valetto camere regis.*" See *Rotuli Scotie, vol. II. p.* 155. Nicholas thus held the same situation, the duties of which had previously been discharged by Serle.

P. 87.—Elizabeth Dunbar, Countess of Murray, the Patroness of Holland, was involved in the catastrophe of her husband, for in an entry in an Exchequer roll, under the *compotum* of the Earldom of Marr, between the terms—the last of July 1455, and 12th of October 1456—the Thanedom of Kintore is said to be in the King's hands, "per *forisfacturam* Elizabethe de Dunbar, olim Comitisse Murravie." At this time there is a charge in the same record for the expenses, "*Domini Davidis Comitis Moravie.*" (*Compot. Strathern, from* 16*th July* 1454, to 18*th October* 1456.) This is a new personage, and unknown to peerage writers or antiquarians. It would seem that he was the youngest son of James II.; he was certainly dead previous to the 18th of July 1457, for of that date, in another Exchequer roll, *quondam* is prefixed to his name. The following excerpt from the *compotum* of Bothkenner, &c., between 6th of August 1462, and 26th July 1463, proves that Countess Elizabeth was allowed a pension by the Crown, and was then married—evidently subsequent to her divorce from George Lord Gordon—to Sir John Colquhoun of Luss. "Expense, &c.—per solutionem factam Elizabethe

Dunbar, olim Comitisse Moravie, de firmis terrarum de duchra sibi ad etatem domini nostri regis quindecim annorum, pro sua sustentatione, in parte solutionis centum marcarum, sibi assignatarum, per cartam domini regis sub magno sigillo, Johanne de Culquhone de Luss, milite ejus sponso fatente receptum." The classical and delightful domains of Tarnaway, with its noble hall, celebrated in the fifteenth century, after they devolved upon the Crown, were turned into a chase, devoted to the pleasures and carousals of the Sovereign. There is an item of expenditure in an Exchequer roll in 1463, incurred by the making and polishing of 15,000 tables in the forest of Tarnaway; and James IV. in 1501, grants to "Jane Kennedy, Lady Bothwel," the Castle of Tarnaway, "als lang as scho remanys, *but (without)* husbande, or uyer man, ande duellande in ye Castle of *Dernway, (Tarnaway)* withe ye kingis son, and hurris *(hers)* James Stewart." *(Privy Seal Record, Vol. II. p. 73.)* This celebrated Lady, who thus engrossed the King's affections, was the daughter of John Lord Kennedy, and had been contracted to Archibald, Earl of Angus, who was imprisoned for venturing to vindicate the preferable claim he conceived he had to her. The James above mentioned, son of the Monarch and Janet, was afterwards Earl of Murray.

Elizabeth Dunbar was only the younger co-heir of Murray; she had an elder sister, Janet, who had the preferable right to the Earldom, and in fact, at one time, assumed the dignity; but the irresistible influence of the Douglasses, before which, at the height of their domination, law and justice, not to add the Sovereign himself, were occasionally made to bend, succeeded in securing it to the former. In the Errol charter chest, there is an original grant, 8th of November 1454, by "*Janeta de Dunbar Comitissa Murravie, et domina de frendracht, et de Crethton,*" to her cousin Walter Ogilvy of Bewfort, to which her seal of arms is appended, containing four quarters—the first, the arms of Murray, as usual, within the double tressure—the second, a lion rampant for Crichton, the arms of James Lord Crichton, her husband, also in her right, Earl of Murray—or it may be for Dunbar, (the

seal being partly defaced) and Janet being a cadet of the Dunbars, Earls of Marob,—the third exhibits Annandale, indicative also of the latter descent—and the fourth, a fess cheque between three *frais*, or strawberry blossoms, for Fraser of Frendraught. This branch of the Frasers, who merged in Murray, had married the heiress of the Stewarts of Frendraught, an ancient stock of the Stewarts, whō can be traced as far back as the time of Robert Bruce.

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The following is a copy of an original document in the Torphichen Charter Chest.

"Robertus dei gratia, Rex Scotorum, omnibus probis hominibus ad quos presentes litere pervenerint salutem. Sciatis quod, avisati cum consilio nostro, concessimus dilecto nepoti nostro Jacobo de Sandilands, et promisimus quod non admittemus aliquam resignationem, vel alienationem hereditariam de baronia de Caveris cum pertinentiis, infra Vice-comitatum de Roxburghe, *quam de nobis tenet Issobella Comitissa de Marr.* Volumus insuper quod si contingat nos negligenter forsitan, et immemorem hujus nostre concessionis, et promissionis, aliquam alienationem admittere, *illam nullam esse volumus, et etiam per presentes revocamus.* In cujus rei testimonium presentibus literis nostris Sigillum nostrum apponi precepimus apud lynlithcu, septimo die mensis februarii, anno Regni nostri quinto-decimo." (1404.)

This new piece of evidence is here inserted in reference to an article in a previous performance, where the representation of the Douglasses at common law, by the family of Torphichen, is fixed, as is conceived, by conclusive proof.[1] It seems very obvious, that unless as heir-at-law of the above Isabel Countess of

[1] See No. III. of Appendix to Desultory Remarks on Scottish Peerage Law, &c.

Marr, the undoubted heir general of the Dougelsses at the time the James Sandilands here mentioned, ancestor of Torphichen, could have had no interest in Cavers; while it was an important consideration to him, in such character, to prevent the Countess from alienating so valuable a part of the Douglas inheritance. The overwhelming power, however, of the Douglasses of the male stock, which also crushed other families, rendered this solemn promise of Robert III. ineffectual, and accordingly the property in question was secured by a natural son of the hero of Otterburn, the ancestor of the Douglasses of Cavers. The previous James Sandilands is styled the King's nephew, because his mother Princess Johanna was sister of Robert III.—which fact, and his descent from Alienora, sister of William first Earl of Douglas, in right of whom he became heir-general of the Douglasses, are instructed by various muniments in the Torphichen charter chest, and elsewhere.[1] By another deed in the same repository, an heritable grant by Duncan Earl of Fife of the barony of Wester Calder in her favor, we have the name of the mother of Earl William, who was *Beatrix Douglas*. She, hence, was not the fabulous Dornogilla Comyn, daughter of John Comyn of Badenoch, by the sister of John Baliol, as has been pretended by some; nor is any countenance afforded to the idea of the Baliol representation and supposed claim to the Crown, having devolved through Beatrix, upon her son. Mr. Tytler in his history, strangely falls into the hackneyed error of the Comyn descent, upon the authority of Riddell of Glen-Riddell,[2] a flimsy antiquarian, and who here further displays his ignorance by making

See page 223.

[1] Among other fine documents in the Torphichen charter chest, there is one in 1384, whereby Robert II., then actually at Calder, attended by his court, remits "*dilecto filio nostro* Jacobo de Sandylandis militi—*et Johanne sponsæ suæ, filiæ nostræ karissimæ*" and to their heirs, the feudal casualty "pro castriwarda Baronie de Caldoure." Immediately upon the death of the good Sir James, it is proved by original seals there, that the Douglasses assumed the chivalrous device of the heart in addition to the cognisance of the stars, and on one occasion it is grasped by two hands.

[2] Vol. III. p. 390.

Comyn the competitor, and his son, *Earls* of Badenagh.[1] The previous learned gentleman also adopts the notion, that the *supposed* right of William Earl of Douglass to the Crown, was derived from his wife, as lawful heir of *Alexander*, brother of John Baliol,[2] but if he had taken the trouble of perusing the claim of the latter, who must have been rather better acquainted with the facts, he would have seen that this is impossible, as Alexander was John's elder brother, and is explicitly stated there to have died without issue.[3] It also appears from this unexceptionable evidence, that the offspring of Dervorgil, the mother of Baliol, through whom he claimed, were only Hugh, Alan, Alexander, and John. Dugdale, upon no authority, confounds Alexander the brother, with Alexander Baliol of Cavers,[4] who was a different person. The last figures in 1271, when he is stated in an authentic transaction, to be the brother of the deceased *Guido* de Baliol,[5] which further disidentifies him; and we find mention of Guido de Baliol as one of the envoys of the King of Scotland, as early as 1265.[6] Alexander of Cavers is further traced in the Chartulary of Coldstream, as early as 1269,[7] and there can be no doubt that he was only a collateral relative, if at all allied to John Baliol.[8]

[1] Archælogia, Vol. ix. p. 57—8.
[2] Hist. Vol. iii. p. 389—90.
[3] Rymer, Vol. ii. p. 579.
[4] Bar, Vol. i. p. 525.
[5] Chartulary of Dryburgh, f. 43—43 b.
[6] Rymer, Vol. i. p. 810. He figures in 1263, in the Chartulary of Soltray, *vide* No. viii.
[7] No. xviii.
[8] Mr. Tytler, referring to Bower, has expatiated upon a delightful and romantic scene, in reference to the Regent Albany, in these words,—"At another time a still finer picture is presented of Albany sitting on the ramparts of the Castle of Edinburgh, and discoursing to his courtiers in a clear moon-light night, on the system of the universe, and the causes of eclypses." (Hist. Vol. iii. p. 396.) This no doubt must excite the attention and admiration of antiquarians, but how does the illusion vanish, when he adds, —"I am sorry I have neglected to mark the page where this occurs, and cannot find it at this moment." This is rather an odd method of verifying a fact in history, (which Mr. Tytler holds a "sacred field,") and particularly unfortunate on the part of the impugner of Lord Hailes; for, after examining Bower, it will be found that there is no such moon-

See page 11.

The Alienora, who has been mentioned, sister of the above Earl William, and the connecting link of the House of Sandilands with the Douglasses, had first been married to Alexander Bruce, Earl of Carrick, son of Edward, younger brother of Robert I., by Isabel of Athol, sister of David Earl of Athol. There was no surviving issue between them; and it is now a point of much obscurity how the Bruces of Clackmannan, the root of the existing Scottish Bruces, are to be deduced from the royal stem. According to MSS. authorities in the British Museum, and Advocates' Library, they are descended from a son of Robert I. —to Douglas in his Peerage, from John, younger son of Robert the competitor,[1] which last descent, however, is quite fabulous. Mr. Wood has properly commenced their pedigree with a Robert Bruce,[2] who certainly, in 1364, obtained a grant or confirmation of parts of the subsequent Clackmannan estate from the Crown. All that the Author can do, is to suggest one previous link. The same lands are proved by the Chamberlain Rolls in 1358—9, &c. to have been in the possession "*Roberti* de Bruys *heredis quondam Thome de Bruys*," while a tierce was allotted out of them to Marjory Charteris, the spouse of Thomas,—but then, again, as to the filiation of Thomas, this new ancestor, it is impossible precisely to speculate.

The Bruces of Connington and Exton, whose founder was Bernard, second son of the competitor, were lawful male des-

light scene,—or imaginary conversation between the Prince and his courtiers, as here represented, upon the boundless subject in question, or causes of eclypses. He talks also of Albany, "being recognised by his soldiers as a collector of the relics of earlier ages,"—his reference being, *Fordun a Goodal, Vol. ii. p.* 409, but not a thing of the kind is to be found there, or indeed any where else.

[1] P. 233. According to a monumental inscription in one of the aisles of Airth church, belonging to the Bruces of Airth, they are deduced "*ex Roberti Brussii Scotorum Regis filio natu secundo.*" It is well known that this monarch left no lawful male issue, except David II., who had no children by either of his marriages; consequently, such descent, if true, must be spurious.

[2] Peerage, Vol. i. p. 511.

cendents of the Royal or Annandale Bruces. And although their male line eventually failed, their representation, in the character of heirs-general, devolved upon the Bruce Cottons of Connington, and the Harringtons of Exton, in England, which latter noble and distinguished family still continues to exist.

Edward, (himself Earl of Carrick) the father of Earl Alexander, who married Alienora Douglas, the Sandilands' ancestrix, is the only brother of Robert I. who can be shewn to have left issue. His remaining brothers, who all died prematurely in the cause of their country, have never as yet been traced to have had any; indeed, there is the utmost taciturnity as to the fact, and negative evidence against it. By the entail of the crown in 1315, also, it will be perceived, that failing the male issue of the body of Robert I., it is directly to go to his brother Edward, and the heirs male of his body; if there had been other brothers or male issue of them extant, it cannot be questioned, from the preference of the male succession which is here avowedly adopted, that these would have been called as the *next* substitutes, or remainder-men; but instead of this, after the last mentioned limitation, the Crown is immediately destined to Marjory, Robert's daughter, who married the Steward—the female heir, and to the lineal heir at common law.[1] What is further conclusive, is the pointed intimation of Fordun, that the father of Robert I. had besides him, "plures alios filios," but "hi omnes," (he adds) "sine prole legitima obierunt."[2] The previous Alexander, Earl of Carrick, it may be here observed, was a natural son.

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P. 4.—The impression that James IV. was alive, prevailed at least three years after the battle of Flodden. This appears from the following curious passage in a letter of Dr. Magnus, to the Lord Legate, in the Harleian Collection, (*Cal.* B. i.)

"The *Quenes grace* (Margaret, James' widow) is confynett, still at Sterling, and seweth faste for the devorce betwene her

[1] See Rob. Ind. Append. p. 7.
[2] Vol. II. p. 149. Edit. Goodall.

said grace, and the saide erle of Anguishe summitting her case to be that she was married to the said Erll, *the late King of Scottis, her husbande being alive*, and that the same king was livinge three yeres after the ffeilde of flodden or brankston."

This is a new ground, different from the one generally assigned for the divorce in question, which turned upon a precontract on the part of Angus.

P. 169.—Greatly addicted as we were of old to various forms and ceremonies, solemn and fanciful, even in acts of inferior importance,[1]—but more particularly in the constitution of marriage, nothing can present a more striking contrast than the extreme laxity of our law, in this respect, in modern times. It really may be said to have gone to its utmost length, as may be exemplified in the instance of Macadam, and perhaps in the later one of Campbell against Honyman—which seem to be mere emanations of modern law, without any warrant from original practice. Admitting marriage only to be a civil contract, something decisively fixing it to be such, might intervene—but where do we discover this, in a strict sense at least, in the previous case? Although there was an acknowledgment and declaration on the part of the man, *who took* the female by the hand,[2] she preserved invariable silence, and nothing directly shewed that a

[1] Thus to constitute an obligation among secondary persons in 1546, Thomas Baxter is stated by the other parties "to have sete his fete on owris, and laid his heid on ilkane of oure heidis, and said, promeisit, yat he suld tak ye peril and charge on him," &c. *Decreet Book of the Official of Saint Andrews within Lothian.* With respect to *sponsalia*, promises of marriage, or betrothments, there intervened, as can be proved "outward signs," "kissing" "drinking to uyeris," "solemn declarations in publick"—"extention of *thare* rycht handis," *i. e.* by *each* party,—presents of each others portraits in "tabulats" of gold—pieces of money, ("ane pece of silver of dense cunze *bowit*,") rings, trinkets, &c.

[2] See the Report of this interesting case by Mr. Fergusson in his Present State of our Consistorial Law, p. 194, which the learned and indefatigable Judge has given us with his usual ability. The children who had been previously begot between these persons, it need not be added, were not put under the "cair-claith."

mutual stipulation or contract had been entered into. Neither did copula follow, but, on the contrary, the male party in a fit of phrenzy, to which he was occasionally liable, shot himself afterwards in the course of the day. The ceremony withal, if it may be called so, was *technically* clandestine, being in his private residence, and in the presence only of casual domestics.

It is obviously a different thing, when persons join hands at the command of a clergyman or third person—here the act is reciprocal, and originates from both; but, in the present instance, such inference cannot be drawn, as by the mere grasp or seizure of the male party, the junction of hands may exclusively have been effected. The contract may, in this manner, be merely unilateral, and not reciprocal. To refer to an able expounder of legal tokens of consent, the conclusion under the circumstances will be amply supported.—" Si quis (Sanchez says,) fœminæ manum capiat dicens, do tibi fidem de matrimonio contrahendo, *si enim ipsa nihil respondeat non est sufficiens signum*, et ita, non erunt sponsalia.[1] He here talks of *sponsalia*, but the remark must hold *a fortiori*" as to a final and concluded transaction.

The Author of course, who chiefly here applies the test of our former practice, has not the presumption, nor intends to question the Macadam decision; but it surely might be better that the interposition of some constituted authority should be enforced upon such occasions. Even in America, where marriage is also a civil contract, in the rudest and most uncultivated parts, " it is the practice to make the contract before a Justice of the Peace; it is thought that his testimony, *as a public officer*, is more imposing than that of a private individual, and these people always attach high importance to legal rank."[2]

[1] Lib. i. Dist. 22, § 6.

[2] Notices of the Americans by a Travelling Bachelor, Vol. ii. p. 339, written, as is known, by a person of eminence in the United States. The Author may take this opportunity of adverting to the ardor and talents with which the study of the law is at present prosecuted in North America. Independently of Chancellor Kent and other authorities who are well known, the works of Justice Story may be here cited, from which

Now this was precisely our notion, and appears to have been an indispensable requisite in our law even after the Reformation. On the sixth of November 1576, Isabel Carrou pursues Alexander Job "for fulfilling of ane promeise of meriage allegit maid to hir *per verba de presenti* before *famouse*[1] witnesses." To this the defender excepts, that her libel was "not relevant wytout the promeise was made *per verba de presenti, in presence of ane* PUBLICT *persone,*" which the pursuer meets with the *single* reply, that it "is sufficient, seeing the witnesses are *eldaris,* and beires *publict* office." Here both parties acquiesce in the principle, that the sanction of a public officiary was necessary, and the only question was, whether an elder of the church could be held to be so; for it is impossible to conceive, that if our modern law had obtained, and if mere interchange of consent before ordinary or private witnesses had been enough, that that would not have been stated, at least, as an alternate defence. So far from this, the defender evidently is forced to admit the doctrine of the pursuer as to publicity, and even the forms in question are sought to be completed by marriage in *facie ecclesie.*[2] We thus also strikingly trace a remnant of our ancient law, which obtained in 1429, when it is stated in a Papal dispensation or indulgence, that Alexander Seton had contracted marriage with Elizabeth, the heiress of Gordon—"per verba de presenti *publice, juxta morem patriæ.*"[3] The only occasions formerly, when proof of actual ceremony was dispensed with, were in cases of parties cohabiting openly as man and wife, and being "habit and repute" such.

See page 161—2.

P. 119.—Although the remarks of Mr. Napier, alluded to, are in fact a *reductio ad absurdum* of the Author's inference of a lawful connection between Craig and the Bellendens, yet the mode

much general information may be gathered upon the subject of legitimacy and marriage, as is sufficiently evident from a recent valuable publication.

[1] The selection of this term, as is abundantly known, on all such occasions, shews that ordinary witnesses were not accounted sufficient.

[2] See Decreets of the Commissary Court of Edinburgh, of the date mentioned.

[3] The same referred to at p. 174, where the word *publice* is casually omitted.

of characterizing them in the contents may be better than what is here used, especially as the learned gentleman may not have viewed them in the light of an attack.

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The evidence that has been alluded to in support of Beatrix Douglas being the mother of William, first Earl of Douglas, may be here stated.

1. Intimation by Winton, under the year 1348, that Sir Archibald Douglas, brother of good Sir James, had two sons, I. *John*, the eldest, who died abroad; II. *William*, the heir of the Douglasses, who he elsewhere shews, was first Earl of Douglas. Vol. ii. p. 268—9—63.

2. Charter by Duncan Earl of Fife, "*domine Beatrice de Douglas, sponse quondam domini Archibaldi de Douglas,*" of the barony of Wester Calder, to her in liferent, et post decessum dicte domine beatricis, *Johanni* de douglas *filio suo et heredi*, ac *heredibus suis.*" *Torphichen Charter Chest.*

3. Charter by "*Willielmus Dominus* de *Douglas*, Jacobo de Sandylandys dilecto et fideli nostro, et domine Elianore de bruys *sorori mee karissime*," of the barony of Wester Caldore—"in *liberum maritagium*," to them respectively in liferent, "et eorum heredibus inter ipsos legitime procreandis." *Ib.* This deed is without date, but it is confirmed by another in the above repository to the same effect by the disponer in 1349; and both the former (Nos. 2 and 3,) are confirmed by David II. in 1356. *Ib.* The *Willielmus dominus de Douglas*, here mentioned, was evidently, and, as can be fully shewn, afterwards Earl of Douglas, who has thus succeeded as heir of his eldest brother John, to Wester Calder, which he makes over to his sister Alienora, the wife of James Sandilands, the ancestor of the family of Torphichen. This possession on his part, with what has preceded, clearly proves him the son, and eventual heir of Beatrix. Besides, it appears from Winton that the Earl's nearest maternal relative and uncle was Sir David *Lindsay*. Vol. ii. p. 269.

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P. 180. In the ever charming and *unique* story of Squire Meldrum—valuable also as delineating our peculiar usages at

an early period—the scruples of the lady to the solicitations of the Squire are thus stated :—

> "My Lord and ye *wes neir of kin*—
> Quharefor I mak you supplication,
> *Pas*, and seik ane *dispensation*
> Then shall I wed you with ane ring,
> Then may ye lufe at your lyking,
> *Haist* to dispens the best ye may," &c.

Owing to the blood relationship between the deceased husband of the lady and her admirer, they were within the forbidden degrees of affinity, which occasioned her opposition—she well knowing that *in hoc statu*, their issue could not be legitimated *per subsequens matrimonium*. The gallant Squire, however, overcame it by other arguments, without the aid of a *previous* dispensation, which, notwithstanding, could alone have the effect of rendering the latter lawful.

FINIS.

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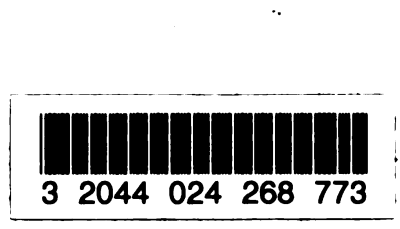


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